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No. 15-114919-S

IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS,
Plaintiff-Appellee,

vs.

FRAZIER GLENN CROSS, JR.,
Defendant-Appellant.

BRIEF OF APPELLANT

Appeal from the District Court of Johnson County, Kansas
Hon. Thomas Kelly Ryan
District Court Case No. 14 CR 853

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Oral Argument Requested: One Hour

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Nature of the Case

This is Frazier Glenn Cross' direct appeal from a conviction of capital murder and sentence of death. He also appeals convictions of attempted murder and aggravated assault, and criminal discharge of a firearm at a structure.

Issues on Appeal

Issue No. 1: The trial court erred in allowing Mr. Cross to proceed pro se in the penalty phase of his capital trial. As a result of his self-representation, the penalty phase failed to satisfy the heightened reliability requirements of the Eighth Amendment to the United States Constitution and Section Nine of the Kansas Constitution Bill of Rights.

Issue No. 2: Reversal of the penalty phase is required because Mr. Cross was allowed to represent himself without an informed and knowing waiver of his right to counsel, in violation of the Sixth Amendment.

Issue No. 3: The court committed reversible error when it failed to direct Mr. Cross' three standby counsel to present a legitimate case in mitigation. The failure to have a reliable mitigation case presented to the jury failed to satisfy the heightened reliability requirements of the Eighth Amendment to the United States Constitution and Section Nine of the Kansas Constitution Bill of Rights.

Issue No. 4: The trial court erred in failing to consider whether Mr. Cross was a "gray-area" defendant, who had mental issues that would render him incompetent to represent himself in a complex capital case.

Issue No. 5: The trial court committed reversible error, in violation of Mr. Cross' rights under the Due Process Clause of the Fourteenth Amendment, and K.S.A. 22-4508 when it denied Mr. Cross' request for funds for a jury consultant.

Issue No. 6: Prosecutorial error in closing argument requires reversal of Mr. Cross' sentence of death.

Issue No. 7: Mr. Cross' sentence of death must be vacated as it was based in part on the unconstitutionally vague provisions of K.S.A. 21-6624(f), in violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution and Section Nine of the Kansas Constitution Bill of Rights.

Issue No. 8: The trial court committed reversible error when it excluded relevant mitigating evidence from the penalty phase of Mr. Cross' trial, in violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution, Section Nine of the Kansas Constitution Bill of Rights and K.S.A. 21-6617.

Issue No. 9: The failure to instruct the jury on Mr. Cross' mitigating circumstance prevented the jury from having a proper vehicle to express its reasoned moral response to Mr. Cross' mitigating evidence.

Issue No. 10: Cumulative error requires the reversal of Mr. Cross' sentence of death.

Statement of Facts

On August 31, 2015, Frazier Glenn Cross, Jr., also known as Frazier Glenn Miller, Jr., was found guilty of capital murder for the intentional and premeditated killings of William Corporan, Reat Underwood and Teresa Lamanno, as part of a common scheme or course of conduct. He was also convicted of the attempted murder of Paul Temme, Mark Brodkey and Jay Coombes, the aggravated assault of Margaret Hunker, and criminal discharge of a firearm at a structure. All these acts occurred on April 13, 2014, in Johnson County, Kansas. (R. **1**, 32-35; R. **40**, 1; R. **5**, 368, 372, 373, 374, 375, 376; R. **23**, 172-173). (Volume numbers are in bold).

On September 8, 2015, the jury that convicted Mr. Cross of capital murder sentenced him to death. The jury found that Mr. Cross knowingly or purposely killed or created a great risk of death to more than one person, and that he committed the crime in an especially heinous, atrocious and cruel manner. The jury further found that Mr. Cross' mitigating circumstances did not outweigh those aggravating circumstances. (R. **5**, 391; R. **49**, 93-96).

On November 10, 2015, the trial court accepted the jury's sentence of death on the capital murder charge and sentenced Mr. Cross to an additional 394 months on the other convictions. (R. **1**, 131-134; R. **16**, 45-46).

Pretrial

Early in the case, after his lead defense attorney had concerns about whether Mr. Cross had a mental disease or defect, the court had Mr. Cross evaluated for competency. (R. **26**, 6). He was found competent to stand trial. (R. **1**, 60). Later, Mr. Cross wanted to fire his attorneys to gain internet access, and because "these gentleman work for my

enemy." (**34**, 34-35; **35**, 14). He was eventually allowed to proceed pro se. (R. **36**, 41). His pretrial motions accused Judge Ryan of being "a high ranking Mason," and the District Attorney of being part of a conspiracy. (R. **5**, 169-170, 167).

Voir dire

The prosecution death qualified the jury. (R. **41**, 106, 217-239; **42**, 77; 190). Mr. Cross passed jurors for cause after obtaining assurances from them that the white race had a right to survive. (R. **41**, 137, 244-263; **42**, 125, 282).

Guilt Phase Evidence

Mr. Cross agreed, for the most part, with the State's case against him, so the statement of facts will be brief. (R. **17**, 23; R. **18**, 6).

The State's evidence tended to show that on April 13, 2014, around 1 p.m. Mr. Cross, using a shotgun, killed Dr. William Corporan and his grandson, Reat Underwood, as they sat in Dr. Corporan's truck, parked in front of the Jewish Community Center in Overland Park, Johnson County, Kansas. (R. **21**, 55-57, 77; 113, 143-144, 146-147, 151; R. **22**, 123, 149). Ballistic evidence connected the shooting to a Remington 870 pump action shotgun found later in Mr. Cross' car. (R. **45**, 27, 28-29, 32-33, 44, 78-79, 109-112, 115-116, 184, 186, 199-201). Tissue from Dr. Corporan's body was found on Mr. Cross' vehicle and on his left shoe. (R. **45**, 159-161, 163-164).

Reat Underwood died from close-range buckshot wounds to his head and face. (R. **22**, 123, 125, 127, 130-131). He was rendered unconscious a moment after being shot, and died relatively quickly because of the damage done to areas of the brain that control

breathing and heart rate. (R. **22**, 130-132). Dr. Corporon died instantly from a close range shotgun blast to his head. (R. **22**, 150-153).

Mr. Cross admitted, during his testimony, that he shot Dr. Corporan and Reat Underwood. (R. **18**, 31-32).

The shooting was witnessed by Paul Temme. (R. **21**, 146). As Mr. Cross was driving away, Mr. Temme chased Mr. Cross' vehicle, and Mr. Cross fired a handgun at him. (R. **21**, 147-148). Mr. Cross admitted during his testimony that he shot at Paul Temme, but denied that he was trying to hit him, because he did not believe that Mr. Temme was Jewish. (R. **18**, 65).

Mr. Cross admitted that he emptied his shotgun at the front doors of the White Theatre, located in the Jewish Community Center. (R. **18**, 62; R. **21**, 40-44, 46-47). He then he used his rifle to shoot more rounds through the door. (R. **18**, 62). Fifty to sixty people were present in the building at the time of the shootings. (R. **21**, 40-44, 58, 104-105). Ballistic evidence tied this shooting to a rifle found in the trunk of Mr. Cross' vehicle. (R. **45**, 68, 109-112, 115-116, 223).

Jay Coombes testified that Mr. Cross shot at him before leaving the Community Center. (R. **21**, 160-161, 162-164, 170-171). Ballistic evidence tied bullets found in Mr. Coombes' vehicle to a revolver found in the passenger compartment of Mr. Cross' vehicle. (R. **45**, 64, 65, 89, 92, 212). Mr. Cross admitted in his testimony that he shot at Jay Coombes with the intent to kill him. (R. **18**, 66).

Dr. Mark Brodkey also testified that Mr. Cross shot at him before leaving the scene. (R. **21**, 130-132, 135). Ballistic evidence tied lead pellet fragments collected from

the interior of Dr. Brodkey's vehicle to the Remington shotgun found in Mr. Cross' trunk. (R. **45**, 109-112, 115-116, 137-138, 201-202). Mr. Cross admitted during his testimony that he shot at Dr. Brodkey's car with the intent to kill Dr. Brodkey. (R. **18**, 61-62).

Mr. Cross then drove to the Village Shalom Retirement Center, where he shot and killed Teresa Lamanno. (R. **21**, 65-66; R. **22**, 23-24). Ballistic evidence tied this shooting to the Remington shotgun and Armscor ammunition found in the trunk of Mr. Cross' vehicle. (R. **45**, 46, 57, 59, 61, 109-112, 115-116, 186-187, 200-201). Mr. Cross admitted during his testimony that he shot Ms. Lamanno, and that the first gun he tried to use did not discharge when he pulled the trigger, so he retrieved another weapon from the trunk of his car. (R. **18**, 68-70).

Ms. Lamanno died from gunshot wounds to the neck, upper chest and right hand. (R. **22**, 148). Her spinal cord was severed. (R. **22**, 143-144). The injury to her spinal cord paralyzed her, and one lung immediately deflated. Ms. Lamanno was alive for five to ten minutes after being shot, and she would have been conscious for part of this time. (R. **22**, 147-148).

This shooting was witnessed by Margaret Hunker. (R. **21**, 76, 78, R. **22**, 17-19, 21-23, 38-38). She heard Ms. Lamanno screaming, "No, no, no," and she saw Mr. Cross pump his shotgun, then put it in the trunk of his car and take out another gun, while Ms. Lamanno continued to scream, then shoot her. (R. **22**, 22). Mr. Cross then pointed the gun at Ms. Hunker and asked if she was Jewish. Ms. Hunker believed that if she gave the wrong answer he would shoot her. (R. **22**, 25). When she replied, "No," he put the gun in

the trunk of his car and drove away. (R. **22**, 24). Mr. Cross admitted during his testimony that he pointed his gun at Ms. Hunker and that he would have killed her if she had said that she was Jewish. (R. **18**, 73-75).

Mr. Cross was taken into custody a short time after the shooting at Village Shalom. (R. **22**, 70-73, 85, 95-96). He made incriminating statements to the arresting officers. (R. **22**, 107-108). A short time later, Mr. Coombes and Dr. Brodkey both identified him as the person who shot at them. (R. **21**, 71-72, 69). Ms. Hunker said Mr. Cross looked similar to her assailant. (R. **21**, 70-71).

Mr. Cross' Evidence

Mr. Cross admitted that the State's evidence against him, "got it pretty close to correct." (R. **17**, 23; R. **18**, 6). He explained that his actions were motivated by his conscience; he was trying to stop genocide, crime and abortions. (R. **17**, 27, 43-44, 48). Although admitting that he carried out the shootings at the Jewish Community Center and Village Shalom on April 13, 2014, he said:

> I submit that I had no criminal intent.
>
> I had a patriotic intent to stop the genocide against my people.
>
> This genocide is as obvious as the words diversity, melting pot, and changing demographics.
>
> That's what it means. That's genocide if you think about it.

(R. **17**, 26).

He felt his acts were justified because George Washington had also killed innocent people. (R. **17**, 52). Mr. Cross believed that through his trial testimony he could convince jurors that he did "a patriotic thing for our country," instead of that he "was just a

bloodthirsty, unreasonable, insane, senseless type of person." (R. **17**, 27). He acknowledged that he had been called a "conspiracy nut," but stated, "I submit that there's conspiracies all around us every day going on. Conspiracies are – actually decide our life, the laws." (R. **17**, 31).

Mr. Cross explained his belief system that provided the motivation for his actions to the jury. (R. **17**, 24). Simply put, he believes that white people, as a race, are threatened on two fronts, first as victims of violence inflicted by black people and second from mixing with other racial groups and "breed[ing] ourselves out of existence." (R. **17**, 39-40, 60).

In 1986, Mr. Cross "declared war on the government." (R. **18**, 18). To carry out this war, he collected about 1,000 pounds of ammunition, pipe bombs, plastic explosives, and hand grenades. (R. **18**, 18). He got caught and spent three years in prison. (R. **18**, 19). He told the jury that the Declaration of Independence and the Constitution gave him the right to "rise up and rebel." (R. **17**, 51-53).

Mr. Cross testified that about ten days before the shooting he had a bad breathing problem. (R. **18**, 8). He went to a hospital emergency room where he was told that nothing could be done for him. He believed that meant that his time was running out. (R. **18**, 9). He had promised himself that before he died he would take some of his enemies with him. (R. **18**, 10). He wanted to strike a violent blow for the preservation of his people and the future of white children. (R. **18**, 11).

Mr. Cross told the jury, "It was premeditated. No doubt about that." (R. **18**, 12). He explained that he convinced a friend to buy guns for him. (R. **18**, 11-12). Then, he

conducted internet research to find a target. (R. **18**, 20). He made five trips to the community center, before April 13, and decided to go on that day because he believed the center was hosting a "Jewish talent show." (R. **18**, 12). He said that his intent was to satisfy his own conscience before he died. (R. **18**, 27).

Mr. Cross testified that he tried to talk himself out of his plan before he carried it out because he loves his freedom and his family. He had to watch videos on the internet to re-enforce his beliefs. (R. **17**, 55-56).

Mr. Cross described himself as "devastated" and "disappointed" when he discovered, six days later, that none of the people he killed were Jewish. (R. **18**, 33). However he would not apologize for killing Dr. Corporan or Ms. Lamanno because he considered them "accomplices." (R. **18**, 80).

Penalty Phase Evidence

State's Aggravating Factors

The prosecution in its opening contended that the following aggravating circumstances had been shown: 1) Mr. Cross purposely killed or created a great risk of death to more than one person; and 2) He committed the crime in an especially heinous, atrocious or cruel manner. (R. **47**, 31).

To show Mr. Cross might have knowledge there would be young people at the event, the prosecution presented the flier that it had previously admitted in the guilt phase, advertising the "KC SuperStars" event and indicating it was a high school competition. (R. **47**, 47). In the guilt-phase, Mr. Cross had previously testified he had not seen that part of the advertisement. (R. **18**, 47).

Defense Mitigation Case

The instructions on mitigators included these: 1) The effects of defendant's beliefs substantially impaired his ability to appreciate the criminality of his conduct; 2) His age was 73; 3) A term of imprisonment is sufficient to protect people's safety; 4) The impact of his death on his family and friends; and 5) His excellent military career. (R. **5**, 384-385).

Frazier Glenn Cross' Beliefs

Mr. Cross testified and presented evidence—at length—in support of his belief that the white race was dying out. He believed it was being caused by Jewish people intent on bringing about a "One World Government." (R. **19**, 133). He testified: "It's been in my head for forty–eight years: I sweated it out, stressed, losing sleep, moaning, groaning, worrying, about the future of our people and the future of our children." (R. **19**, 133). The agenda of the new government will be to create a humanity of ignorant "slave-drugged robots, wallowing gleefully inside the global plane plantation." (R. **49**, 63). He warned that when "they" get complete control, "You'll just be out there in a field somewhere being exterminated." (R. **48**, 83). He explained that by working their jobs, the jurors were actually working to "enslave the world [in] a one world government." (R. **47**, 61).

He testified that no one is free, and everyone is on "a great big plantation." (R. **47**, 123). And because the State is forcing people to race mix, in five years the "mere public sight of a white couple will be seen as a blatant act of racism." (R. **47**, 155). He explained that the Israel secret service was running around the United States at will

"assassinating people, killing people, burning people's houses." (R. **47**, 124). One of his biggest fears was that after the jury's verdict he would be flown to Israel for trial. If so, he explained, "I might jump out of that plane on the way over if there's a door open or a window." (R. **47**, 116).

He had previously tried to solve these problems working within the political system. (R. **47**, 148). And if the government had left him alone he would have become president of the United States, and would have "straightened this country out." (R. **47**, 149). He had killed William Corporan because he was "contributing to a fund raising event" of his enemy. (R. **48**, 138).

For evidence that Jewish people controlled the government, he played a video of a United States Congressman, who indicated that the Israeli lobby was the most powerful lobby in America. (R. **47**, 55-56). He presented an article where Reverend Billy Graham indicated that there was a Jewish "stranglehold" in the media. (R. **47**, 97).

Love of Friends and Family

After Geraldine Perry's husband died, Mr. Cross helped her during times of poverty and hardship. Mr. Cross and her husband, Fred, had been best friends. (R. **19**, 51). While Fred was alive her family had a pretty good income, but after he passed away all she received was $198 in food stamps to live on. Her house was mortgaged, and she testified, "I had nothing." (R. **19**, 48).

However, Mr. Cross gave her money to pay her mortgage. There were a lot of times when Mr. Cross knew she was in need, so he would "make up" work for her to do as a way to give her money so she would not need to ask for it. (R. **19**, 48). She stated,

"Without [Glenn] helping me, I wouldn't even—I'd be homeless. That's all there is to it." (R. **19**, 48). Once, Mr. Cross discovered her crying, because her mother had died and there were problems with the funeral arrangements. They hugged each other and he was a comfort to her. (R. **19**, 50). There were many times that she could talk to him, when no one else seemed to care. (R. **19**, 50).

Bella, her French bulldog, is her best friend. She stated, "Without Ms. Bella and Frazier, I wouldn't even have a roof over my head." (R. **19**, 47).

Mrs. Perry testified that she had no transportation. But Mr. Cross was available any time she needed him. He gave her rides to the store, and would drive her 50 miles to Springfield, MO. He also drove her to Kansas City to file for Social Security benefits. (R. **19**, 53). After her testimony Mr. Cross told her his assistance had been a labor of love, and she told him she loved him too. (R. **19**, 53).

Mrs. Perry had been to his house and met his children and his wife. She had watched him around his children and said that he was a very good father, and that his kids loved him. (R. **19**, 51).

Mr. Cross' oldest son

Mr. Cross' oldest son, Frazier Miller III, is 39-years old. He has two sisters, and had two brothers—now deceased. He drives a truck and has an eBay business. (R. **19**, 57). He described that his father had been a good dad,

> No matter how hard times got, Dad stood by his family. Anytime we had a need, he was there for us. Except for his belief system which I -- Nobody in our family really agreed with him so much on that [...] He always loved his family and supported his family and for the most part was a good father.

(R. **19**, 58).

He added,

> I don't know where he learned all the things that he learned about hating the Jews and having so much hatred towards other races. But my family life was always decent, and he was always there.

(R. **19**, 58).

Frazier grew up on a 27-acre farm in the country with cows and a horse, and his dad built the kids a tree house in the woods that he and his brothers enjoyed a lot. (R. **19**, 61). His father took good care of him, providing a good house, clothes, and food. (R. **19**, 61).

Frazier's youngest sister is 23. She is a teacher, and was given scholarships for college. She is happily married. She and her husband travel a lot, including to South America, and she's done quite well for herself. (R .**19**, 61). His other sister, Anna, is now 31. She is pregnant with a baby girl, Ashley, who is due soon. (R. **19**, 63).

Mr. Cross explained that since his daughter, Anna, was having a baby soon, he told her not to come to his trial. She was going to come in spite of the baby, but he told her not to. (R .**19**, 71). She attended college and is quite successful. She is "very religious, very moral, super moral." He explained that three nights previous "she was just crying so bad. I knew how she was going to be if she came. She'd probably have me crying, and that's the last thing I want to do." He concluded, "So I told her not to come, so that's the reason she's not here." (R. **19**, 71).

Mr. Cross expressed pride in his family. Defense exhibits O, P, Q, and R, are pictures of his family. He has 20 albums of family photos, beginning in 1974. He has 200 VHS family videos. (R. **19**, 126).

Mr. Cross pointed out a family photo showing one of his taller sons, who is deceased. He also showed the jury a photo from Anna's wedding which depicted him walking her down the aisle. He testified that all his kids are happily married, with wonderful spouses. (R. **19**, 127).

Mr. Cross' two sons, Michael and Jesse, are deceased. Michael was killed in car wreck when he was only 19. (R. **19**, 128).

Fragile Health

Dr. James Lineback, Associate Clinical Professor of Medicine, teaches physiology at the University of California, Riverside. (R. **20**, 5-6). He testified that statistically, a normal 74-year old male will live to age 85. However, Mr. Cross' chronic obstructive pulmonary disease, depression, and nocturnal hypoxemia will cause 5.6 years to be lost from the normal 11-year life expectancy. (R. **20**, 26).

Mr. Cross' chronic obstructive pulmonary disease has two components. The first is emphysema, which is the destruction of lung tissue, and is not treatable or reversible. (R. **20**, 11). Mr. Cross also has large holes in his lungs which now look like Swiss cheese. (R. **20**, 11).

The second component of COPD is chronic bronchitis, a disease of the airways which are inflamed. These patients have restricted breathing, making it feel like they are breathing through a straw instead of a pipe. (R. **20**, 11). At rest, breathing through a straw may work, but for walking across a room, a straw may not work. (R. **20**, 12).

Treatments are limited. A medication called Albuterol can relax the bands of smooth muscle surrounding airways, opening them up. (R. **20**, 13). But COPD is very

difficult to treat, because the damage is permanent. (R. **20**, 14). The inhaler Mr. Cross uses does not affect his life expectancy, it only improves breathing. (R. **20**, 19).

Military record

Mr. Cross' military record was admitted into evidence as exhibit KK. (R. **48**, 45-47). It showed that Mr. Cross was assigned to the Green Berets Paratroopers. Combat campaigns he participated in were: Vietnam Counter Offensive; Vietnam Counter Offensive Phase II; Vietnam Summer to Fall 1969; Vietnam Winter to Spring 1970; Sanctuary Counter Offensive; Vietnam Counter Offensive Phase VII; and Vietnam Defensive Campaign. (R. **48**, 50).

He retired from the U.S. Army with 20 years of active military service and the rank of Master Sergeant, and an honorable discharge. (R. **48**, 51). He received the following commendations: Parachutist Badge, National Defense Service Medal, Vietnam Service Metal, Army Commendation Medal, Bronze Star Medal, Republic of Vietnam Campaign Medal, Republic of Vietnam Gallantry Cross with Palm, and five Good Conduct Medals. (R. **48**, 50). He was awarded the Army's Commendation Medal for meritorious achievement in connection with military operations against a hostile force in the Republic of Vietnam. (R. **48**, 61). The Army awarded him the Bronze Star. (R. **48**, 61).

Mr. Cross took the stand and apologized for the three people who died. (R. **48**, 78). He stated that he had taken responsibility for his actions countless times, and said, "I even confessed before I was arrested. I had two signed confessions in my car." (R. **48**, 79). However, he indicated on cross examination that he would have killed more people

if he had the physical stamina to do it. (R. **48**, 87). He admitted to using violence on civilians while he was in the military, and in 1987 he was prosecuted by the federal government because he had weapons and explosives. (R. **48**, 97).

Regarding the deaths in this case, he stated that he was proud of what he did, and felt emotionally good afterwards. (R. **48**, 127, 128). Although he told a friend on the phone while he was in jail that he would not apologize to anyone for this, it did not reflect how he felt now, and he was sorry. (R. **48**, 130).

On the fourth day he objected to instructions because they lessened his chance to be on death row. (R. **20**, 69, 71). At the end of closing arguments he asked the jury to reject mercy, and requested that he be made a martyr to his people. (R. **20**, 81-83). He called jurors "lemmings" and asserted he had attacked "our slave masters." (R. **49**, 80-81).

At the end of his testimony he told the jury that he had not lied to them, and regretted asking them for mercy. He did not want it. He predicted they would vote for death. (R. **48**, 145-146).

Argument and Authorities

Issue No. 1: The trial court erred in allowing Mr. Cross to proceed pro se in the penalty phase of his capital trial. As a result of his self-representation, the penalty phase failed to satisfy the heightened reliability requirements of the Eighth Amendment to the United States Constitution and Section Nine of the Kansas Constitution Bill of Rights.

Standard of Review

The issue of whether a defendant has the right to waive representation by counsel in the penalty phase of a capital trial is a question of law, which this Court reviews using a *de novo* standard of review. See generally *State v. Thomas*, 291 Kan. 676, 692, 246 P.3d 678, 689 (2011).

Preservation

In capital cases, pursuant to K.S.A. 21-4627(b), the Supreme Court of Kansas shall consider the question of sentence as well as any errors asserted in the review and appeal and shall be authorized to notice unassigned errors appearing of record if the ends of justice would be served thereby.

The constitutionality of allowing Mr. Cross to proceed pro se was not challenged in the district court. Generally, constitutional issues cannot be raised for the first time on appeal. *State v. Coman*, 294 Kan. 84, 89, 273 P.3d 701 (2012). However, the claim involves a question of law based on uncontested facts, and resolution of the claim will be determinative of Mr. Cross' death sentence. Therefore, consideration of the claim is necessary to prevent the denial of fundamental rights, bringing it within the exceptions to the general rule. *State v. Hawkins*, 285 Kan. 842, 176 P.2d 174 (2008).

Background

Prior to trial, the court accepted Mr. Cross' waiver of counsel. (R. **36**, 43). From that point on, Mr. Cross represented himself during all phases of trial, including the voir dire, the guilt phase, and penalty phase. (R. **40**, 4; **21**, 5; **47**, 37).

When the trial court allowed him to waive counsel, the court and parties all had misgivings. (R. **24**, 44). The prosecutor announced it was "a terrible idea." (R. **24**, 6).

Mr. Cross' pretrial paranoia about jail medical personnel trying to murder him (R. **36**, 14), and racially inflammatory statements (R. **38**, 125-171), were early signals that self-representation could prevent the jury from hearing any serious case for life.

As predicted, his self-representation was a disaster. His obsession with the "one world government" that started prior to trial continued into voir dire and through the penalty phase. (R. **41**, 244; **19**, 148). During trial, his legal arguments relied for authority on George Washington, Perry Mason, and the Bible. (R. **23**, 23; **17**, 68; **23**, 45). He failed miserably in voir dire to assure that all seated jurors would be capable of granting life, even if he were convicted as charged of murders. This "life qualifying" of a jury is a fundamental task required of all capital defense counsel. In the penalty phase, he failed to call crucially important mitigating witnesses, including his two daughters, his wife, four friends, and "dozens of potential witnesses" originally identified by defense counsel. (R. **19**, 71; **26**, 10; **15**, 13-14; **5**, 28).

Before deciding whether to impose the death penalty, a jury must hear the painful and tragic aspects of a defendant's life. See O'Brien, *When Life Depends on it: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 693, 715 (2008) ("The [United States Supreme] Court's decisions also emphasize that painful aspects of a defendant's life history are a very important source of mitigating evidence.") Instead Mr. Cross chose to present lengthy evidence and argument, supposedly in mitigation, that his racist beliefs and conspiracy theories were so reasonable that they compelled him to kill three people.

By focusing on racist justifications for his actions, he neglected a sympathetic life history, which should have focused on his service in Vietnam and the deaths of his two sons and how those deaths altered his life. He kept covered any hint that he might have a mental disorder or dementia, which was suggested by his rants and outbursts, and by the records that defense counsel saw which had alerted them to the need to retain a "specialized psychologist, psychiatrist or neuropsychologist." (R. **5**, 37).

After presenting a few friends and one family member who spoke well of him, Mr. Cross focused entire days of testimony on convincing the jury of the conspiracy that will lead to a "one world government." (R. **48**, 73-74). His final argument ended in an attempt to become a martyr for his "cause" by challenging the jury to "look at me in the eyes. Do you see the fear?" He requested the jurors to fight the Jews stating, "It's them or us." And then he requested they show him no mercy. (R. **49**, 82-83).

While *Faretta v. California*, 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975), being a noncapital case, arguably gave Mr. Cross a right to self- representation during the guilt phase, it did not address the sentencing phase of a capital trial when the need for heightened reliability in capital cases is in full play. Mr. Cross should not have been allowed to use the penalty phase as a platform to air his paranoid political views and conspiracy theories—for days — and deprive the jury from considering a full mitigation case that his three attorneys would have presented.

Discussion

The court allowed Mr. Cross to waive his three appointed capital defense counsel and represent himself in the guilt and penalty phases of his capital case. However, the

right to self-representation should yield to the Eighth Amendment interest in fair capital trials. In *Faretta v. California*, 422 U.S. 806, the Supreme Court affirmed a defendant's right to self-representation in a state criminal trial, but *Faretta* was a non-capital case, and did not address self-representation in a capital trial or its penalty phase. Conversely, the Eighth Amendment requires that death sentences be the result of reliable procedures. In *Gardner v. Florida*, 430 U.S. 349, 358, 51 L. Ed. 2d 393, 97 S. Ct. 1197, 1204 (1977), the Court observed,

> It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

430 U.S. at 357-358. Accord *Beck v. Alabama,* 447 U.S. 625, 638, 100 S. Ct. 2382, 2390, 65 L. Ed.2d 392 (1980) *(*"To ensure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination.")

The Supreme Court specifically requires that the heightened reliability in capital cases be achieved by presenting a jury with all available mitigating evidence. *Woodson v. North Carolina*, 428 U.S. 280, 303, 49 L. Ed. 2d 944, 96 S. Ct. 2978, 2991 (1976) (Eighth Amendment requires consideration of the character and record of the individual offender as a constitutionally "indispensable part of the process of inflicting the penalty of death.") *Wiggins v. Smith*, 539 U.S. 510, 538, 156 L. Ed. 2d 471, 123 S. Ct. 2527, 2544 (2003) (in the penalty phase of a capital trial, the failure of counsel to find and present evidence such as severe privation and abuse in first six years of Wiggins' life constituted ineffective assistance of counsel); *Rompilla v. Beard*, 545 U.S. 374, 162 L.

Ed. 2d 360, 125 S. Ct. 2456 (2005) (trial counsel's limited investigation into mitigating evidence constitutional deficient performance). See also American Bar Assn. (ABA) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereinafter "ABA Guidelines"), 31 Hofstra L. Rev. 913, 923 (2003) ("The quality of counsel's 'guiding hand' in modern capital cases is crucial to ensuring a reliable determination of guilt and the imposition of an appropriate sentence.").

Mr. Cross, in proceeding pro se, controlled the defense evidence that was considered by the jury, and essentially chose his own sentence—death. This is contrary to normal sentencing procedures in Kansas. Non-capital defendants cannot choose their own sentences, judges and juries do. Nor do defendants control the information a sentencer considers. See K.S.A. 21-4604 (the court's PSI will contain mitigating and aggravating circumstances and may contain a mental examination of the defendant.). By allowing the defendant to take the helm at sentencing in a capital case, a jury is accorded *less reliable* evidence than considered by a judge even in a low level felony.

The *Faretta* rright to self-representation is not absolute. Even in non-capital cases it has been curtailed. For example, there is no right to self-representation on appeal. *Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 145 L. Ed. 2d 597, 120 S. Ct. 684 (2000) (defendant's right to autonomy changes dramatically after a jury returns a guilty verdict); and a defendant may be denied self-representation if he is found incompetent to present his case. *Indiana v. Edwards*, 554 U.S. 164, 174, 171 L. Ed. 2d 345, 128 S. Ct. 2379, 2386 (2008) (denial of self-representation is proper for a

defendant who is competent to stand trial, but lacks sufficient mental capacity to represent himself.).

Pro se defendants do not have the skills or resources to present the jury with a reliable mitigation case for life.

The reasons why unrepresented capital defendants are incapable of presenting a reliable mitigation case are almost too numerous to count. The most obvious reason is that they are in jail awaiting trial and cannot possibly comply with even the most fundamental of requirements, like conducting face-to-face interviews of numerous witnesses. ABA Guidelines, 31 Hofstra L. Rev 913 at 1020 (requires capital counsel to conduct personal interviews of witnesses in the presence of a third person) (Appellant has attached relevant guidelines in Appendix A).

Another impossible hurdle is that a defendant has no ability to self-screen for neurological and psychological deficits. See ABA Guidelines, 31 Hofstra L. Rev. 913 at 956-959 (since the defendant's mental health is of vital importance to the jury's decision in the penalty phase, the mitigation specialist must have skills to "recognize mental or neurological conditions," and counsel must obtain a "thorough physical and neurological examination.")

Yet another reason is that a frequent barrier to mitigating evidence, which must include painful aspects of a defendant's life, is the defendant. See *Williams v. Taylor*, 529 U.S. 362, 398, 146 L.Ed.2d 389, 120 S.Ct. 1495 (2000) (mitigating evidence that "might well have influenced the jury's appraisal of [the defendant's] moral culpability" included a childhood filled with abuse and privation). ABA Guidelines, 31 Hofstra L.

Rev. at 1024 (the information needed for sentencing is very personal and may be extremely difficult for the client to discuss, like childhood sexual abuse. Obtaining such information requires overcoming barriers of "shame, denial, and repression" as well as "mental or emotional impairments.")

The Court's decision in *Rompilla v. Beard*, 545 U.S. 374, illustrates the nature of powerful mitigating evidence and why an unrepresented defendant cannot be entrusted to present it. In *Beard*, the United States Supreme Court reversed Rompilla's death sentence because trial counsel failed to uncover a powerful mitigation case. The Court observed,

> Rompilla's evidence in mitigation at his penalty phase consisted of relatively brief testimony: five of his family members argued in effect for residual doubt, and beseeched the jury for mercy, saying that they believed Rompilla was innocent and a good man. Rompilla's 14-year-old son testified that he loved his father and would visit him in prison.

545 U.S. at 378.

However, in performing consistently with the ABA Guidelines, Rompilla's post-conviction counsel produced compelling mitigating evidence the original team failed to uncover. The Court summarized some of the evidence Ronald Rompilla's jury did not hear:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and

> excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

Beard, 545 U.S. at 391-392

The Court found that the original attorneys' investigation fell below the ABA standards requiring that they explore all avenues leading to relevant information. 545 U.S. at 387. As it relates to allowing self-representation, the crucial thing is that Rompilla himself was no help in uncovering the evidence. He told his first attorneys he was "bored being here listening." 545 U.S. at 381. The case illustrates not only how ordinary attorneys' failure to follow ABA standards can result in a substandard penalty proceeding, but also how defendants cannot be relied on to conduct this phase, because they cannot be counted on to recognize or disclose crucial mitigating evidence.

Mr. Cross' deficient penalty-phase performance.

This Court must reject the fiction that Mr. Cross was competent to handle this case. He was not. Under the standards for capital counsel set forth by the United States Supreme Court, and adopted in Kansas, he never will be. A jury could not have made a "reasoned moral response" on the basis of this record. See *Penry v. Lynaugh*, 492 U.S. 302, 319, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989) (the death sentence must reflect a jury's reasoned moral response to defendant's background, character, and crime).

By allowing self-representation, the court allowed Mr. Cross to give speeches on the dangers of the one world government, but ensured that the jury would be deprived of a constitutionally reliable mitigation case. Instead of presenting comprehensive mitigation, Mr. Cross used the penalty phase as a platform to ask the jury to make him a

martyr for his cause, and assisted the prosecutors in advocating for his own death. His final request to show him no mercy, sealed his fate. (R. **49**, 82-83).

Regarding legitimate mitigation evidence, Mr. Cross only presented his son and two more helpful character witnesses. (R. **19**, 57, 40, 46). Also helpful were accolades from his military service, and a doctor's explanation of his dire physical health issues. (R. **48**, 45; **20**, 5).

But it was all halfhearted. He explained to the court, after putting on the mitigating witnesses, that he had gone along with some of his attorneys' recommendations "to help them out" and to "not hurt their feelings." (R. **20**, 101). His brief mitigation case pales in comparison to the full-throated case juries are entitled to hear from qualified attorneys. While he only called three useful lay witnesses, his counsel had identified potentially "dozens." (R. **5**, 28). (Appendix B: counsel's motion). Those not called included four long-time friends. (R. **15**, 13-14). He excluded both daughters—Anna and Macy. (R. **19**, 63). Anna was excluded because she was having a baby, and because "[s]he was just crying so bad." (R. **63**, 71). The other excluded daughter was a respected teacher. (R. **19**, 63). Notably absent was Margie, his own wife. (R. **19**, 127). The daughters and wife might have assured the jury they loved him and that his death would be emotionally devastating. They may have shown he was a loving husband and father.

He presented evidence of a long military career, culminating in an honorable discharge. However, there is no mention of any actual experience during his two combat

tours of Vietnam: whether there were acts of bravery, loss of friends, or exposure to war-time atrocities.

Also conspicuous for its absence, Mr. Cross utterly failed to acknowledge that he had any mental health issues, or that age had impaired his reason. Mr. Cross retired and successfully raised a family. Suddenly, at the age of 73, he decided to kill three people, seeking to avert a future one world government, where everyone would live on "a great big plantation." (R. **47**, 123).

He wanted the jury to think that his beliefs were so rational and compelling that they convinced an ordinary individual like him to commit murder. So he avoided any hint to suggest that these sudden acts were the product of an undisclosed mental illness or a neurological disorder. Mental disorders are ubiquitous in capital cases. See ABA Guidelines, 31 Hofstra L. Rev. at 1007 ("the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that '[i]t must be assumed that the client is emotionally and intellectually impaired.'" (citation omitted))

By maintaining that the sudden killings were based on reason, while simultaneously ranting about the dangers of a "one world government" and the "Anti-Semitism Act," he raised more questions about his mental health than he answered. His best friend since the fourth grade initially told counsel he thought Glenn was crazy. (R **26**, 10). Echoing that concern, his defense attorneys had written, "Because defense counsel is aware of significant potential physical, psychological, psychiatric and neurological conditions suffered by Mr. Cross, it would not be reasonable for defense

counsel to simply ignore these conditions and neglect to retain and consult with a qualified mental health expert." (R. **5**, 42).

Psychiatric concerns surfaced during trial. He engaged in long paranoid rants prior to trial against the Jewish strategy to "blow up the world"; and then requested subpoenas for Ted Turner, Rand Paul, and Mel Gibson. (R. **15**, 22-29; 31-33). He requested to read a book for the duration of the guilt phase (R. **21**, 189), which reflects not only highly abnormal behavior, but a level of disinterest similar to the absolute worst in capital representation. See e.g. *Burdine v. Johnson*, 262 F.3d 336, 339–40 (5th Cir. 2001) (capital murder conviction reversed because the defense lawyer slept during the case. The attorney claimed he had a "habit" of closing his eyes while concentrating, but four neutral witnesses saw his head bobbing.)

The jury that observed Mr. Cross' bizarre trial behavior was entitled to the results of neurological and psychological testing. While it may be tempting to say that Mr. Cross created his own problem, and it was his choice to make, that view is misguided since society has an interest in fair proceedings. *Indiana v. Edwards*, 554 U.S. at 177 (2008)(in rejecting defendant's right to self-representation because of deficits in mental competency, Court asserts that "proceedings must not only be fair, they must 'appear fair to all who observe them.'" (internal citation omitted)).

By wanting to appear as though he was a contented individual whose "cause" compelled him to act, Mr. Cross skimmed over all painful aspects of his life. When he made only a passing reference to the deaths of his two sons, it was a monumental omission. (R. **49**, 56). By failing in any manner to explore the circumstances of those

deaths, and the anguish and suffering he must have experienced as a parent, he deprived the jury of its right to understand him as a human with a life beset by adversity. It was core mitigating evidence stemming from the "diverse frailties of humankind" and therefore highly relevant to a sentencer's decision. See *McCleskey v. Kemp*, 481 U.S. 279, 304, 95 L.Ed.2d 262, 107 S.Ct. 1756, 1774 (1987) (describing nature of mitigating evidence as compassionate factors stemming from "diverse frailties of humankind"). When a defendant's life story includes unbearable hardship and suffering —which the death of children is likely to cause—mercy may be extended.

Similarly, when he failed to call his daughter Anna, because she and he would cry, the jury was deprived of the chance to see through the bravado he constantly displayed, and see the emotional frailty he has in common with ordinary people.

He only made a passing reference—and only in the guilt phase—to the idea that his father was responsible for teaching him his views: "My dad, he was very Jew wise, and he taught me quite a bit…he got me started." (R. **17**, 48). By failing to explore how his extremist views were passed to him as a child, the jury was deprived of its right to consider that he was partly a product of his upbringing. This connection was not made until after the jury was dismissed, and a victim's family member at sentencing stated that Mr. Cross was not born to hate, he was taught that. (R. **24**, 196). His father's extremism could also be evidence of a mental illness that ran in the family, but was left uncovered in this case through lack of any investigation.

As a prisoner of his own irrational thinking, Mr. Cross was never capable of making the connection between his deeply flawed upbringing and the disturbing views

that propelled him to these tragic actions. See O'Brien, *When Life Depends on it: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 693, 723 (2008) (the defendant's redeeming traits must be accompanied by circumstances that affected his formative development, to show that "he is not solely responsible for what he is.").

Mr. Cross' counsel felt that witnesses who knew about Mr. Cross' childhood would be "invaluable" and there were "promising leads." (R. **5**, 39). But there was not one iota of evidence presented covering his childhood which is so vital to capital mitigation. If it involved physical abuse, privation, or humiliation, the jury was entitled to know it. If there was a family history of mental illness, the jury was entitled to know that, too. In both *Wiggins v. Smith*, 539 U.S. 534-35, and *Williams v. Taylor*, 529 U.S. 395, the Supreme Court set aside death sentences because counsel failed to collect and present the client's trauma history.

Worst of all, the jury and this Court can have no assurance that there was not vastly more persuasive mitigation evidence that went unpresented. Since he had tours of combat in Vietnam (R. **17**, 49), there can be no assurance from this record that he did not suffer combat injuries or PTSD. There can be no assurance he does not have the type of mental health history juries find mitigating in death cases, such as significant psychiatric disorders, hospital admissions, paranoia, cognitive difficulties and lapses, and dementia-related issues with judgment and decision-making. There is no confidence he does not have brain injury, or undisclosed physical injuries.

There can be no assurance that he was not abused by his racist father, or that he did not suffer various humiliations and privations in childhood, the kind of mitigating evidence that *Wiggins* held was powerful. There is not even an assurance that his disturbing claim of committing violence while in the military was true, rather than an effective ploy to help ensure his own death.

There can be no assurance that he has not done many more good works, assisting many people in small and large ways, as he did with Geraldine Perry and his son. As brief and one-sided as his mitigation case was, it still showed there were many avenues left unexplored.

ABA Standards

No capital pro se litigant will ever be qualified to proceed alone in a capital case under the ABA Guidelines. See ABA Guidelines, 31 Hofstra L. Rev. at 923. ("Today, it is universally accepted that the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master.")

Although the Supreme Court has never held that the ABA Guidelines or Supplementary Guidelines are mandatory, they have nonetheless served as a guide for determining whether counsel has been ineffective in death-penalty cases. See, e.g., *Rompilla v. Be*ard, 545 U.S. 387–90; *Wiggins v. Smith*, 539 U.S. 524; and *Williams v. Taylor*, 529 U.S. 396. Kansas follows these ABA standards in appointing counsel to capital cases. K.A.R. 105-3-2. Under them, Mr. Cross was grossly unqualified:

- Mr. Cross could not take the place of four team members who are appointed to these cases. The ABA Guidelines require appointment of "at least two attorneys, a fact investigator, and a mitigation specialist." 31 Hofstra L. Rev. at 1003.
- Mr. Cross had no mental health training. The ABA Guidelines require a team member to be qualified to screen for mental or psychological disorders. 31 Hofstra L. Rev. at 952.
- He had no specialized legal training. The ABA Guidelines require lead capital counsel to have training in capital pleadings, motion practice, jury selection, and use of experts. 31 Hofstra L. Rev. at 976.
- He could not conduct an investigation from inside a jail cell. The ABA Guidelines require an "extensive and generally unparalleled investigation" into mitigation evidence. 31 Hofstra L. Rev. at 1025. "It is necessary to locate and interview the client's family members… and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers…" 31 Hofstra L. Rev. at 1024.
- He had no ability to recognize legal error, let alone preserve it for appeal. ABA Guidelines require preservation of all trial error, because "failure to preserve an issue may result in the client being executed even though reversible error occurred at trial." 31 Hofstra L. Rev. at 1030.

- He had no voir dire skills. The ABA Guidelines require counsel to understand techniques for exposing jurors who would automatically vote for death following a murder conviction regardless of individual circumstances of the case. 31 Hofstra L. Rev. at 1049.
- He had little ability or desire to recognize and present mitigating evidence. The Guidelines require the ability to recognize and present all valuable mitigation evidence. 31 Hofstra L. Rev. at 1062

That Mr. Cross fell so far short of the ABA Guidelines is a factor showing that this trial lacked the reliability required. Compliance with these Guides helps provide assurance of a fair trial. As observed by the Iowa Supreme Court in *State v. Sweet*, 879 N.W.2d 811, 822 (Iowa 2016):

> The upshot of the Supreme Court's *Gregg–Woodson* line of cases is that in states where the death penalty is authorized with an appropriately detailed statute, **a highly specialized "death penalty bar" has arisen to ensure that death-penalty defendants obtain the kind of representation necessary to prevent arbitrary and capricious application of the sanction** and allow the death penalty to be imposed only on the most culpable offenders.

(emphasis added).

Arbitrary factor

On appellate review, to uphold the death sentence, this Court must determine that the sentence is not the result of "any arbitrary factor." K.S.A. 2015 Supp. 21-6619 ("[T]he court shall determine: (1) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor.").

The arbitrary factor in this case was Mr. Cross' self-representation, and includes 1) his failure to death qualify the jury; 2) his lack of effort or ability to investigate or present

mitigation; and 3) his intent to present a case that would result in state assisted suicide. Reliability cannot be present in capital proceedings when the pro se defendant fails to fulfill the role of competent capital trial counsel.

Section Nine of the Kansas Constitution Bill of Rights, which prohibits the infliction of "cruel or unusual punishment" is generally construed by this Court in the same manner as the Eighth Amendment, and so would also require the kind of reliability in capital sentencing that pro se representation cannot provide. See, *State v. Scott*, 265 Kan. 1, Syl. ¶ 1, 961 P.2d 667, 668 (1998)("The Cruel and Unusual Punishment Clauses of the Eighth Amendment to the United States Constitution and § 9 of the Kansas Constitution Bill of Rights are nearly identical and are to be construed similarly.")

The decision to impose death in this case could not be made without an appropriate mitigation case that Mr. Cross could not and would not present.

Issue No. 2: Reversal of the penalty phase is required because Mr. Cross was allowed to represent himself without an informed and knowing waiver of his right to counsel, in violation of the Sixth Amendment.

Standard of Review

The validity of a waiver of the right to counsel under the Sixth Amendment is a question of law subject to de novo review. See *United States v. Vann*, 776 F.3d 746, 762 (10th Cir. 2015). Kansas courts review trial court findings on waivers of counsel for substantial competent evidence. See *State v. Turner*, 239 Kan. 360, 365, 721 P.2d 255 (1986). The state has the burden of showing that an accused was advised of his or her

right to counsel, and that waiver of counsel was knowingly and intelligently made. *State v. Daniels*, 2 Kan.App.2d 603, 605–06, 586 P.2d 50 (1978).

Preservation

Mr. Cross represented himself during the trial and penalty phases of this capital case. There was no objection to that during the proceedings below. In capital cases, pursuant to K.S.A. 21-4627(b), the Supreme Court of Kansas shall consider the question of sentence as well as any errors asserted in the review and appeal and shall be authorized to notice unassigned errors appearing of record if the ends of justice would be served thereby.

The constitutionality of allowing Mr. Cross to proceed without a knowing waiver of counsel, was not challenged in the district court. Generally, constitutional issues cannot be raised for the first time on appeal. *State v. Coman*, 294 Kan. 84, 89, 273 P.3d 701 (2012). However, the claim involves a question of law based on uncontested facts, and resolution of the claim will be determinative of Mr. Cross' death sentence. Therefore, consideration of the claim is necessary to prevent the denial of fundamental rights, bringing it within the exceptions to the general rule. *State v. Hawkins*, 285 Kan. 842, 176 P.2d 174 (2008).

Background

At a pretrial hearing on May 14, 2015, Mr. Cross requested that his lawyers be discharged so he could talk directly with the court about his attempts to negotiate a plea. (R. **36**, 8). The court conducted a waiver-of-counsel colloquy, and granted Mr. Cross' request to waive assistance of counsel. (R. **36**, 41). (Appendix C: Waiver Hearing).

Thereafter, Mr. Cross represented himself at the guilt and sentencing phases of his capital trial, and the jury ultimately sentenced him to death. (R. **5**, 391).

During the waiver of rights colloquy, the court did not indicate that Mr. Cross would be waiving counsel for the penalty phase, nor did Mr. Cross indicate that he wanted to waive counsel for the penalty phase. The court did not advise him as to the nature of a capital trial: No charges, defenses, or procedures were made known to him. It did not advise him as to the nature of the penalty phase: No aggravating circumstances or mitigating factors were made known to him. The court did not tell him that the jury would weigh mitigators against aggravators, and that he had the right to have the jury consider anything about his character and background that would warrant a sentence of less than death. The court did not inform or warn him that with assistance of counsel he would have a team of professionals who could investigate, craft and present a case in mitigation.

Regarding the penalty phase, the court told him, "[I]f you're convicted and then you go to the penalty phase that you face being put to death for this case." (R. **36**, 15-16, 35). The court informed him that his attorneys had specialized knowledge as capital defense attorneys, and were experienced. It advised that he could change his mind about waiving counsel, but they could not go "back and forth." (R. **36**, 22-23). It explained that it was to his detriment not to accept his attorneys' services, and he might make statements leading to his conviction which he otherwise would not do. (R. **36**, 27).

After Mr. Cross stated he had experience in one prior trial, the court informed him of the similarity with this case: "[I]t's the same principles as far as selecting a jury,

opening statements, presenting evidence, cross-examining witnesses, closing arguments." (R. **36**, 29-30).

The court then continued with these warnings: The court would not help him with objections. (R. **36**, 31-33). His proposed defense may not be valid, and being in custody would make it difficult for him to interview witnesses. (R. **36**, 34, 35).

The court clarified that Mr. Cross' purpose in firing his attorneys was so that he could ask the court for internet access. Mr. Cross informed the court the other reason was because "you won't let me speak about the reason for my plea bargain. [...] Which I've done now." (R. **36**, 40, 47-48).

Mr. Cross cannot be presumed to have understood anything about the penalty stage, based on this record. His waiver of counsel for that stage was invalid under the Sixth Amendment and Fourteenth Amendments of the federal constitution, as well as § 10 of the Kansas Constitution Bill of Rights. Mr. Cross' death sentence must therefore be reversed.

Discussion

An accused has a constitutional right to self-representation but must knowingly, intelligently, and voluntarily waive the right to counsel. *Faretta v. California*, 422 U.S. 806, 819–21, 45 L.Ed.2d 562, 835, 95 S.Ct. 2525 (1975). The record must establish that he was "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta*, 422 U.S. at 835 (citations omitted).

There is a "strong presumption against the waiver" of counsel and the judge must conduct a thorough investigation as to the circumstances of the case before accepting a waiver:

> To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Von Moltke v. Gillies, 332 U.S. 708, 724, 92 L.Ed. 309, 68 S.Ct. 316 (1948) (plurality).

To validly waive counsel, a defendant must actually understand all of the relevant considerations; thorough advice from the court alone is not sufficient. See *Godinez v. Moran*, 509 U.S. 389, 401 n. 12, 125 L.Ed.2d 321, 113 S.Ct. 2680 (1993). Consequently,

> "[a] judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

Von Moltke, 332 U.S. at 724, 68 S.Ct. 316 (plurality).

In Kansas, this Court has approved a three-step framework to determine whether a waiver of counsel is knowing and intelligent:

> First, a defendant should be advised of both his or her right to counsel and right to appointment of counsel in cases of indigency. Second, the defendant must possess the intelligence and capacity to appreciate the consequences of the waiver. Third, he or she **must comprehend the nature of the charges and proceedings, the range of punishments, and all facts necessary to a broad understanding of the case**.

State v. Buckland, 245 Kan. 132, 138, 777 P.2d 745 (1989) (emphasis added).

In Kansas, a knowing and intelligent waiver of counsel also requires that the defendant be informed of the dangers and disadvantages of self-representation. *State v. Jones*, 290 Kan. 373, 376, 228 P.3d 394 (2010).

The above requirements for waiving counsel, where the court must advise the defendant about the nature of the proceedings being waived, are applicable to the penalty phase of a capital trial. The right to counsel applies at all "critical stages" of the criminal process of an accused who faces incarceration. *Iowa v. Tovar*, 541 U.S. 77, 80, 158 L.Ed.2d 209 124 S.Ct. 1379 (2004). The penalty phase of a capital trial is "effectively a trial on the issue of punishment." *State v. Kleypas*, 305 Kan. 224, 268, 382 P.3d 373 (2016). The aggravating factors which the prosecution must prove at the penalty phase operate as the "functional equivalent of an element of a greater offense" and must be found by a jury. *Ring v. Arizona*, 536 U.S. 584, 609, 153 L.Ed.2d 556, 122 S.Ct. 2428 (2002).

A. A silent record cannot show that Mr. Cross waived counsel for the penalty phase.

The record does not show that Mr. Cross waived counsel for the penalty phase. The court did not inform him of his right to counsel in the penalty stage, and instead the court's colloquy centered on his desire to represent himself "at trial." (R. **36**, 15, 35). A wavier may not be presumed from a silent record. *State v. Daniels*, 2 Kan. App.2d 603, 605, 533 P.2d 1225 (1975). The Supreme Court of New Jersey has found that the second phase of a capital trial was so critical that when a defendant waives counsel for trial, there is a separate colloquy required for the penalty phase. *State v. Reddish*, 181 N.J. 553, 859 A.2d 1173, 1198 (2004).

B. There was no knowing and voluntary waiver of counsel for the second stage, because the court did not explain the nature of those proceedings.

In Kansas, to waive counsel for a proceeding, a court's inquiry must show the defendant "comprehends the nature of the charges and proceedings," and "the range of permissible punishments." *State v. Buckland*, 245 Kan. 132, 138, 777 P.2d 745 (1989). See also *Braun v. Ward*, 190 F.3d 1181, 1186 (10th Cir. 1999) ("The Sixth Amendment inquiry into waiver should be tailored to the particular stage of the criminal proceeding.").

The trial court told Mr. Cross nothing about the second stage proceedings where the jury would make a death determination. It only told him that the prosecution intended to "seek the death penalty" and that if convicted he would then "go to the penalty phase" where he "face[ed] being put to death." (R. **36**, 14, 16).

However, the nature of the proceedings for determining life or death at the second stage of a capital trial are not intuitively known by most people. Since a defendant's life hangs in the balance at that stage and defense counsel has an enormous role to play there, a defendant must be told something about it before he can knowingly waive counsel.

In *State v. Reddish*, 181 N.J. at 595 (2004), the New Jersey Supreme Court held that the trial court must conduct separate inquiries concerning waiver of counsel before both the guilt and penalty phases of a capital case. The court further admonished trial courts to adjust the colloquy to meet the circumstances and exigencies in each instance, and that the inquiry before the penalty phase may warrant questions beyond those posed for the guilt phase.

To waive counsel for a criminal trial, a defendant must be informed of the nature of the charges. Therefore, the court should have informed Mr. Cross that in the penalty

phase the aggravating factors operate as elements, and the prosecution in his case must prove beyond a reasonable doubt that: 1) The defendant knowingly or purposely killed or created great risk of death to more than one person; and 2) The defendant committed the crime in an especially heinous, atrocious or cruel manner. See K.S.A. 21-6624(f).

The court should have informed him of the range of punishment for the penalty phase, which is life in prison without parole, or death. See K.S.A. 21-6617e. See *Buckland*, 245 Kan. at 138 (colloquy must include the range of punishment). However, in its colloquy in this case, the court only informed Mr. Cross of the maximum punishment, death. (R. **36**, 16).

Beyond informing him of the penalty phase charges and range of punishment, there are key things a defendant should be told about the nature of the penalty phase, which are not intuitively known. These are set forth in K.S.A. 21-6617: The penalty phase is essentially a separate trial on punishment, where the burden would be on the prosecution to prove beyond a reasonable doubt its two charged aggravating circumstances. If the prosecution carried that burden, the defense would then be entitled to put on evidence of any and all mitigating circumstances. Those circumstances could include anything about his character and background justifying a sentence of less than death, and they do not have to justify or explain his actions in this case. The jury in reaching a verdict can attach as much weight to the mitigating circumstances as it desires. After weighing the mitigators against the aggravators, all 12 jurors would have to agree that death was the appropriate punishment, otherwise the sentence would be life without parole.

The above advice is vital. Without understanding the full importance of the second phase, a defendant could easily waive assistance of counsel in the belief that the second stage is a mere formality, and that having been convicted of multiple homicides, a sentence of death is a foregone conclusion. This assumption is false, but nothing the trial court told Mr. Cross would have corrected for it.

The lack of Mr. Cross' understanding of the penalty phase surfaced on the third day of voir dire, where he expressed that he had misunderstood the jury's role in the second phase. (R. **42**, 209). He stated:

> **THE DEFENDANT:** ...they have not been told, these people that have some doubts about the death penalty, and I'm pretty convinced that most of them believe that the instructions or the judge's instructions and the jury instructions are going to require them to vote for the death penalty if they find me guilty. That's what most of them have said. They feel that they are required to do that.
>
> What they haven't been told is there's several things that has to happen before they are even required to consider the death penalty. **I didn't even know that myself until just a few minutes ago**. They've got to prove how many aggravating circumstances at least?
>
> **MR. MANNA:** Judge, do you want me to address this?
>
> * * *
>
> **THE DEFENDANT:** In order for the jurors to be required to consider the death penalty, not required to vote for the death penalty, but to consider voting for the death penalty, several things have to happen. First of all, I've got to be proven guilty. **Then the prosecutors have to prove I don't know how many aggravating circumstances. I asked Mr. Manna a while ago and he didn't answer**.
>
> How many?
>
> **MR. MANNA:** The existence of one or more aggravating circumstances proven beyond a reasonable doubt."
>
> **THE DEFENDANT:** That has to happen. Then once they've proven at least one, proven beyond a reasonable doubt in their mind, they have to also prove

that that one or more aggravating circumstances outweighs my mitigating circumstances.

* * *

THE DEFENDANT: My point is it has not been made clear.

THE COURT: And I'll also point out for the record, Mr. Miller, another disadvantage you have by representing yourself is you've had the opportunity to bring all those issues up during your questions of these jurors before they're excused and you haven't touched on anything.

THE DEFENDANT: I didn't know about it until today.

THE COURT: Again you're proving part of the problem with representing yourself, sir.

(R. **42**, 209-218) (emphasis added).

Not only did Mr. Cross waive the assistance of his three counsel for the second phase without knowing the vital role of that phase, it appears from the passage above that he was still struggling to understand the nature of those proceedings during voir dire. His confusion about the role of aggravators lasted through the penalty phase. (R. **49**, 29). It is reasonable to think that Mr. Cross waived counsel for the penalty phase, without knowing the death penalty would not be a presumed sentence, but would require evidence, argument, and jury deliberations on the appropriate punishment.

Mr. Cross' confusion about the nature of the penalty phase was natural, because the proceedings are not intuitive. Even jurors who have actually participated in these proceedings often remain significantly confused about them later. See Julie Howe & James Luginbuhl, *Discretion in Capital Sentencing Instructions: Guided or Misguided?* 70 Indiana Law Journal 1161, at 1177 (1995) (large numbers of capital jurors surveyed

thought that death was mandatory if the evidence proved that the murder was heinous, atrocious, or cruel).

Since his life was in the balance, Mr. Cross was entitled to at least as much information about the second phase from the court as it gave to the prospective jurors during voir dire. Jurors were made aware of the nature of the aggravating and mitigating circumstances, and the balancing that would be required. (R. **40**, 20). Without giving Mr. Cross at least as much information as it gave to prospective jurors, the court could not be assured his decision to waive counsel was adequately informed.

C. The capital defense attorneys' role in the penalty phase was not explained.

The court did not explain the defense attorneys' role for the penalty phase. A defendant cannot knowingly abandon penalty phase counsel without knowing what they do. In *Patterson v. Illinois*, 487 U.S. 285, 298, 101 L.Ed.2d 261, 108 S.Ct. 2389, 2397 (1988), the Court held that to determine the warnings required for waiver of right to counsel, the courts must focus on the scope of the representation, asking "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage."

A colloquy that includes the scope of capital counsel's duties is critical because, "death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases." American Bar Assn. (ABA) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 923 (2003). A defendant cannot waive the benefit of counsel at the penalty phase of a capital trial with "eyes open,"

without some understanding of the benefit counsel provides. *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938d) (a waiver is an "intentional relinquishment or abandonment of a known right or privilege").

At minimum, a defendant in Kansas who contemplates waiving penalty phase defense counsel, should be told by the court that his team of two capitally trained attorneys and one mitigation specialist, have as their central role in the penalty phase discovering and presenting to the jury all relevant mitigation evidence. *Wiggins v. Smith*, 539 U.S. 510, 524-25, 156 L. Ed. 2d 471, 23 S. Ct. 2527 (2003) (explaining that presenting all available mitigation evidence and rebutting aggravating evidence were "well-defined norms" for capital defense counsel).

The defendant should also be given an idea of what mitigating evidence is:

> among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history,* prior adult and juvenile correctional experience, and religious and cultural influences.

Wiggins v. Smith, 539 U.S. 510, 524, 123 S. Ct. 2527, 2537, 156 L. Ed. 2d 471 (2003) (emphasis in original).

The warnings above would ensure that a defendant knows that mitigating evidence that could achieve a life verdict could include a detailed life history. Whereas, in this case, the trial court's brief explanation of the attorneys' roles touched on a few generic trial skills, and their ability to file motions. (**36**, 22, 28).

D. The court's colloquy concerning the guilt phase of the capital trial was also deficient.

The court did not read the capital charges or possible punishments for the guilt phase. See *State v. Buckland*, 245 Kan. 132, 138, 777 P.2d 745 (1989) (defendant must be informed of nature of charges and range of punishment). For the range of punishment, Mr. Cross should have been informed that life without parole was possible upon a conviction for capital murder. For the charge, the court should have read the charge of capital murder, as set forth in count 1: The intentional and premeditated killing of more than one person as part of the same act or transaction. (R. 1, 32-35).

For all the foregoing reasons, Mr. Cross' waiver of counsel was not knowing and voluntary and the case should be reversed on this basis.

Issue No. 3: The court committed reversible error when it failed to direct Mr. Cross' three standby counsel to present a legitimate case in mitigation. The failure to have a reliable mitigation case presented to the jury failed to satisfy the heightened reliability requirements of the Eighth Amendment to the United States Constitution and Section Nine of the Kansas Constitution Bill of Rights.

Standard of Review

The issue of whether the trial court in a capital case must appoint standby counsel to present a mitigation case, after a defendant waives counsel and proceeds pro se, is a question of law, which this Court reviews using a de novo standard of review. See generally *State v. Thomas*, 291 Kan. 676, 692, 246 P.3d 678, 689 (2011).

Preservation

In capital cases, pursuant to K.S.A. 21-4627(b), the Supreme Court of Kansas shall consider the question of sentence as well as any errors asserted in the review and

appeal and shall be authorized to notice unassigned errors appearing of record if the ends of justice would be served thereby.

The constitutionality of allowing Mr. Cross to proceed pro se, without meaningful assistance from standby counsel, was not challenged in the district court. Generally, constitutional issues cannot be raised for the first time on appeal. *State v. Coman*, 294 Kan. 84, 89, 273 P.3d 701 (2012). However, the claim involves a question of law based on uncontested facts, and resolution of the claim will be determinative of Mr. Cross' death sentence. Therefore, consideration of the claim is necessary to prevent the denial of fundamental rights, bringing it within the exceptions to the general rule. *State v. Hawkins*, 285 Kan. 842, 176 P.2d 174 (2008).

Background

Mr. Cross' standby attorneys should have been appointed to present a mitigating case, because they were qualified and prepared to do that. Prior to being discharged, they were pursuing investigative leads in "great abundance," including "dozens of potential witnesses in many states." (R. **5**, 46, 28). They were pursuing a mental assessment of Mr. Cross because there was "significant potential physical, psychological, psychiatric and neurological conditions suffered by Mr. Cross." (R. **5**, 42).

After Mr. Cross discharged his counsel in order to get access to the internet (R. **35**, 14, 20; **36**, 8, 13, 48), the court appointed his three attorneys as standby counsel. (R. **36**, 41). But during all phases of trial they were limited to discussing the case with him only when the jury was not present. (R. **11**, 73). And with the court's approval, counsel refused to call or question witnesses for him. (R. **19**, 121, 123).

As discussed in Issue No. 1, Mr. Cross' trial performance during voir dire and the guilt phase was grossly deficient. And during the penalty phase he fared no better. Of the "dozens of potential witnesses" originally identified by his attorneys, he presented several character witnesses, and a medical specialist. He did not call his wife, two daughters, military friends, or a mental health specialist.

These few legitimate mitigation witnesses were eclipsed by his lengthy attempts to "prove" to the jury that the white race was dying out. (R. **47**, 127). Finally, on the fourth day of the penalty phase, he simply lost interest and told the judge he wanted to go to death row and be a martyr. He complained the instructions conference was boring and he wanted a nap. (R. **20**, 60, 57). On the fifth day of penalty phase Mr. Cross arrived for closing arguments complaining that he had lost the notes for his entire closing argument because his computer shut down. (R. **49**, 11).

His closing argument—a critical juncture when highly qualified capital attorneys normally bring all the mitigation evidence together into a compelling plea for life—turned into a speech against Jews, the media, homosexuals and abortion. (R. **49**, 63, 65, 66-67). In the midst of this he expressed his anger about "blond jokes" because "deep inside" blond people are "hurting about that." (R. **49**, 66). At the very end he decided to call the jurors, "the most cowardly two-legged, featherless creatures who ever walked the Earth, by far," and he dared them to give him death. (R. **49**, 77, 82). He declared he wanted to be a martyr and wanted no mercy. (R. **49**, 81).

A jury could not give a reasoned moral response in choosing life or death for Mr. Cross on the basis of the case Mr. Cross chose to have them hear.

Discussion

The court should have appointed defense counsel to present a case in mitigation, because Mr. Cross was incompetent and unqualified to do so. In *Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562, 95 S.Ct. 2525 (1975), the Court established a constitutional right to self-representation, but it has never been held to be absolute. The trial judge may appoint "stand-by counsel" even over the defendant's objection, to assist the accused. 422 U.S. at 834 n. 46. Accord *McKaskle v. Wiggins*, 465 U.S. 168, 79 L.Ed.2d 122, 104 S.Ct. 944 (1984).

The *Faretta* decision involved a trial on the merits of a noncapital offense. It did not purport to determine the right of self-representation once a person is convicted and is facing sentencing for the crime, nor did it purport to speak to the penalty phase of a capital case.

If a defendant is allowed self-representation in the penalty phase, the Eighth Amendment requirements of a reliable sentencing proceeding in a capital case should require active participation of standby counsel in presenting a mitigation case to the jury.

The Supreme Court has declared individualization "essential" in capital cases in light of the "profoundly different" penalty of death. *Lockett v. Ohio*, 438 U.S. 586, 605, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978). In *Gregg v. Georgia*, 428 U.S. 153, 190, 96 S. Ct. 2909, 2933, 49 L.Ed.2d 859 (1976), the Supreme Court considered the constitutionality of several state death penalty statutes. The high court began its discussion comparing it to the accurate sentencing required in noncapital cases:

> If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, **then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.**

(Emphasis added).

In 1982, the Supreme Court ruled that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a *matter of law*, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 113, 71 L.Ed.2d 1, 102 S.Ct. 869, 876 (1982) (emphasis in original).

The United States Supreme Court's heightened reliability requirements of capital verdicts and sentences led states like Kansas to adopt stringent requirements for attorneys representing defendants facing the ultimate punishment. See K.A.R. 105-3-2 (adopting ABA Guidelines for qualifications of capital counsel). By proceeding pro se, the defendant loses the benefit of two dedicated capital attorneys, a mitigation specialist, and an investigator, who are required to conduct an "unparalleled investigation." American Bar Assn. (ABA) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (herein after "ABA Guidelines"), 31 Hofstra L. Rev. 913 at 1025 (2003).

Without meaningful involvement of standby attorneys, an unrepresented defendant is inherently unable to meet the heightened requirements of capital representation: Being in jail he cannot perform an "unparalleled investigation." ABA Supplementary

Guidelines, 36 Hofstra L. Rev. 677 at 689 (2008) ("Team members must conduct in-person, face–to-face, one-on-one interviews with …witnesses who are familiar with the client's life, history, or family history.") As an untrained layperson, a capital defendant does not know enough about trials or capital litigation to fulfill any of the roles of the defense team.

Permitting Mr. Cross in this case to withhold from the jury—through lack of effort or knowledge—relevant mitigation undermined the integrity of the judicial process, defeated the reliability of the outcome and subverted our adversary system of justice. Mr. Cross in effect appropriated to himself a judgment that only society, through the jury in this case, can make.

As discussed in Issue No. 1, Mr. Cross' brief mitigation case was constitutionally deficient: He avoided putting in any powerful mitigation testimony from his wife, two daughters, or military friends. He scarcely mentioned the tragic deaths of his sons, or any other tragic or painful aspects of his life. The jury heard no information about Mr. Cross' mental health, even though his political obsession, frequent court outbursts, and the sudden and extreme nature of this crime all suggest a disorder. There was nothing presented about his childhood, a traditional source of mitigation. His extremist views were passed to him from his father, but he did not recognize the mitigating aspect of that, or that it suggested the possibility that mental illness ran in his family.

Presenting a competent mitigation case was simply beyond Mr. Cross' grasp. In fact, his three trained counsel convincingly argued that they could *not* put together a mitigation case in time for trial: There was too much evidence left to investigate,

including "dozens of potential witnesses" and Mr. Cross' mental health issues. (R. **5**, 28). If three capitally trained counsel could not have presented a competent mitigation case in time for this trial, the jury definitely failed to receive one from Mr. Cross.

Court has discretion to appoint standby

In Kansas trial courts have the discretion to appoint standby counsel. *State v. Matzke*, 236 Kan. 833, 837, 696 P.2d 396, 400 (1985). Factors which should be applied in making that determination —the complexity and importance of the litigation—would apply to every capital case. See *People v. Gibson*, 136 Ill.2d 362, 380, 556 N.E.2d 226 (1990) (because of the gravity of the charge and the complexity of the capital proceedings, failure to appoint standby counsel to actively assist was an abuse of discretion).

If standby counsel fail to submit mitigating evidence, a capital sentencing jury is deprived of reliable mitigation available to the sentencer in all other types of Kansas cases, even concerning the most minor violations. See K.S.A. 21-4604 (the court's PSI will contain mitigating and aggravating circumstances and may contain a mental examination of the defendant).

To achieve reliability in capital sentencing, courts have recognized that standby counsel may be required to present mitigation, even over a defendant's objections.

In *Muhammad v. State*, 782 So.2d 343, 363 (Fla. 2001), the defendant discharged counsel prior to the penalty phase in a capital trial and presented no mitigation evidence to the jury. The jury recommended death. The Florida Supreme Court reversed, finding that the court failed "to provide for an alternative means for the jury to be advised of

available mitigating evidence." The Court conceded that it "continued to struggle with how to ensure reliability, fairness, and uniformity in the imposition of the death penalty in these rare cases where the defendant waives mitigation." 782 So.2d at 363. It advised courts that in future cases, where mitigation is waived, that the court prepare a "meaningful" and "comprehensive" PSI to include mental health problems and family background. It held that not only could trial courts require the State to place in the record all evidence in its possession of mitigation, they could also call their own mitigation witnesses, or appoint counsel to do so.

In *State v. Koedatich*, 112 N.J. 225, 336, 548 A.2d 939, 997 (1988), the defendant was convicted of capital murder but instructed his attorney to do nothing in the penalty phase. Defense counsel complied, and defendant was sentenced to death. The New Jersey Supreme Court reversed, finding that the state's interest in a reliable penalty determination trumps a defendant's right to waive the preparation of mitigating evidence:

> It is self-evident that the state and its citizens have an overwhelming interest in insuring that there is no mistake in the imposition of the death penalty. Accordingly, we have the constitutional and statutory duty to review every judgment of death. Without any evidence in the record of mitigating factors we are missing a significant portion of the evidence that enables us to determine if the imposition of the death penalty was appropriate.

State v. Koedatich, 112 N.J. at 332.

Prior to abolishment of capital punishment in New Jersey, the Court issued its decision in *State v. Reddish*, 859 A.2d 1173, 1203-04 (N.J. 2004), recognizing that a pro se defendant cannot fulfill the role of competent trial counsel in a capital case. It therefore required standby counsel to present mitigation evidence after a capital conviction, even over the defendant's objection.

The *Reddish* court grounded its decision in the inherent complexities of death penalty cases, noting that even the most well-intentioned attorneys are unable to adequately defend their clients' rights at trial due to all the special rules involved in these cases. 859 A.2d at 1200. The court recognized the defendant's autonomy interest, but concluded that it was outweighed by the law's "heightened obligation to ensure consistency and reliability in the administration of capital punishment." 859 A.2d at 1201. Cf. *State v. Moore*, 273 Neb. 495, 499, 730 N.W.2d 563, 566 (2007) (court stayed a death penalty case on its own motion, without defendant's consent, noting, "Although we respect the defendant's autonomy, the solemn business of executing a human being cannot be subordinated to the caprice of the accused.")

Legal commentators have also favored requiring standby counsel to present mitigation. In Paulin, *The role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 NYU L. Rev. 676 (2000), the author observed,

> The social harm inflicted by improperly imposed capital punishment warrants requiring the search for and presentation of mitigating evidence in every capital case. If the defendant opposes introducing mitigating evidence at the sentencing hearing, a court that fears a *McKaskle* violation can appoint an attorney, other than standby counsel, who will act on the court's behalf, not the defendant's, to present mitigating information.

75 NYU L. Rev. at 724.

Abuse of discretion

If this Court is unwilling to find that standby counsel should be appointed to present a mitigating case in all capital cases, it should find the court abused its discretion in failing to appoint them to do so in this case. According to *State v. Marshall*, 303 Kan. 438, 445, 362 P.3d 587 (2015), an abuse of discretion occurs when a judicial action is

"arbitrary, fanciful, or unreasonable, i.e., no reasonable person would take the view adopted by the trial court."

The trial court was on full alert from the start that Mr. Cross was uninterested in presenting a legitimate case in mitigation. He signaled his intent to present irrelevant evidence in pretrial demands to subpoena Jill Stein, Rand Paul, Mel Gibson, David Horowitz and Ted Turner. (R. **15**, 33). He made it abundantly clear prior to trial that he wanted to prove there was a war on white people, a proposition which was totally irrelevant to the case. (R. **15**, 22-29).

Because of Mr. Cross' determination to present irrelevant issues and skip over a meaningful mitigation case, his highly trained and prepared counsel should have performed that task. Mr. Cross never prohibited that, he only wanted a chance to "talk" to the jurors about his cause. Except for giving advice outside the courtroom, all three capitally trained trial counsel were paid to sit silently behind him throughout an entire capital trial.

Because of the failure to appoint standby counsel to present mitigation, the jury was deprived of a true life story, including Mr. Cross' upbringing, tragic life events, and any psychiatric issues. This life story, required by *Wiggins v. Smith*, 539 U.S. 510, 538, 156 L. Ed. 2d 471, 123 S. Ct. 2527, 2544 (2003), was replaced by Mr. Cross' courtroom speeches against a one-world government. The jury could not express its "reasoned moral response" on this record.

Section Nine of the Kansas Constitution Bill of Rights, which prohibits the infliction of "cruel or unusual punishment" is generally construed by this Court in the

same manner as the Eighth Amendment, and so would also require appointment of counsels to present mitigating evidence. See, *State v. Scott*, 265 Kan. 1, Syl. ¶ 1, 961 P.2d 667, 668 (1998)("The Cruel and Unusual Punishment Clauses of the Eighth Amendment to the United States Constitution and § 9 of the Kansas Constitution Bill of Rights are nearly identical and are to be construed similarly.")

This Court must also determine, on the basis of this record, that the sentence was not the result of "any …arbitrary factor." K.S.A. 2015 Supp. 21-6619. Because the jury was deprived in its decision-making of the presence of a reliable case in mitigation, it constitutes an arbitrary factor.

Issue No. 4: The trial court erred in failing to consider whether Mr. Cross was a "gray-area" defendant, who had mental issues that would render him incompetent to represent himself in a complex capital case.

Introduction and Standard of Review

The United States Supreme Court has determined that there is a difference between competency to stand trial and competency to undertake self-representation. A court may properly deny a defendant who falls within this "gray area" the right to self-representation. Kansas law requires that a trial court, *sua sponte*, order a competency evaluation when there is a bona fide doubt as to the defendant's competency.

An abuse of discretion standard applies when evaluating whether a district court should have *sua sponte* ordered a competency evaluation. *State v. Foster*, 290 Kan. 696, 703, 233 P.3d 265, 273 (2010). An abuse of discretion may occur if the court fails to consider or to properly apply controlling legal standards. *State v. Woodward*, 288 Kan.

297, 299, 202 P.3d 15 (2009). See also *State v. Brinklow*, 288 Kan. 39, 42, 200 P.3d 1225 (2009) (a court's complete failure to exercise its discretionary authority is an abuse of discretion.).

Preservation

In *Foster*, 290 Kan. 702, this Court determined that the issue of competency to stand trial raised due process concerns reviewable even without defendant's pursuit of the issue before the district court. Accord *State v. Barnes*, 293 Kan. 240, 255, 262 P.3d 297 (2011) (citing due process concerns and addressing the merits of an issue regarding competency to stand trial even where not raised below).

Discussion

The court allowed Mr. Cross to discharge his attorneys and represent himself in this case. However, Mr. Cross' behavior on numerous occasions should have alerted the trial court to the need to determine whether he was competent to represent himself.

This is a procedural competency claim, based upon the trial court's failure to hold an adequate competency hearing. To prevail on a procedural competency claim "the petitioner must establish that a reasonable judge should have had a bona fide doubt as to his competence at the time of trial." To do so, a petitioner need not establish facts sufficient to show he was actually incompetent or to show he was incompetent by a preponderance of the evidence. *McGregor v. Gibson*, 248 F.3d 946, 954 (10th Cir. 2001). "The failure to hold a competency hearing, when 'evidence raises a bona fide doubt as to defendant's competency, is a denial of due process.' [Citations omitted]" *Foster*, 290 Kan. 704.

In *Indiana v. Edwards*, 554 U.S. 164, 176, 171 L.Ed.2d 345, 128 S.Ct. 2379, 2387 (2008), the United States Supreme Court held that the standard of competency required for self-representation is higher than that to stand trial. The *Edwards* Court observed that a defendant may be competent to stand trial if represented by counsel yet lack the "ability to play the significantly expanded role required for self-representation...." It held that: "The Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." 554 U.S. at 177.

As the court explained,

> [d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant.

554 U.S. at 177.

The Court pointed out that a defendant must be mentally competent to carry out trial tasks:

> Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways... In certain instances an individual may well be able to satisfy *Dusky's* mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.

554 U.S. at 175.

The types of tasks a defendant must be competent to handle in an ordinary criminal case are: organization of defense, making motions, arguing points of law, participation in voir dire, questioning witnesses, and addressing the court and jury.

Edwards, 554 U.S. at 175. The Supreme Court in *Edwards* affirmed the trial court's decision requiring the defendant to be represented by counsel. To illustrate that Edwards suffered an impairment that affected his self-representation, the *Edwards* court attached a convoluted motion that the defendant had filed *pro se*. 554 U.S. at 179.

The *Edwards* Court also pointed out that the basis for self-representation, to "affirm the dignity" of a defendant, will not "affirm the dignity" of a defendant who lacks the mental capacity to conduct his defense without assistance of counsel. Rather, "the spectacle that could well result from his self-representation at trial is at least likely to prove humiliating as ennobling." 554 U.S. at 176. The lack of capacity threatens an improper conviction or sentence and therefore "undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." 554 U.S. at 176. It also noted its prior holdings that "proceedings must not only be fair, they must appear fair to all who observe them." 554 U.S. at 177 (citation omitted).

Mental concerns quickly surface:

In the instant case the record raises a bona fide concern that Mr. Cross was not competent, by reason of an undisclosed mental impairment, to defend a complex capital case. Those concerns began to surface almost a year prior to trial. At a hearing on November 12, 2014, the lead counsel of his defense team, concerned about his competency to stand trial, informed the court Mr. Cross wanted to plead guilty and accept death so he could watch television on death row. (R. **26**, 7). Counsel could not determine whether Mr. Cross' thinking was being affected by his "pursuit of a cause" or whether it was the product of a mental disease or defect. (R. **26**, 8).

Counsel felt it was highly unusual: "I've been at this a long time, Judge. I've been at this going on 30 years. I tried a dozen cases in Oklahoma before I came in Kansas, death cases, people who have been executed, executions that I was at. I've never had anyone do this." (R. **26**, 9). Counsel felt Mr. Cross could be "driven by a mental disease or defect." (R. **26**, 10). Counsel also received a call from a childhood friend of Mr. Cross', who said Mr. Cross was "crazy." But after Mr. Cross called him, the friend retracted the statement. (R. **26**, 11). Although this counsel withdrew from the case, his next lead counsel expressed similar concerns, stating that based on records counsel "may need to retain specialized psychologist, psychiatrist, or neuropsychologist to conduct additional testing." (R. **5**, 37).

In pursuit of a world-wide conspiracy:

Mental concerns were apparent the first time Mr. Cross addressed the court, when he explained that he had offered to plead guilty because he thought the nurses were trying to kill him. (R. **26**, 12). He tried to explain how his crimes in this case were justified by the United States Constitution and Declaration of Independence, because the "white race" was dying out. Significant to his future handling of this case, he believed he could convince the jury of these truths. (R. **26**, 14-15). He explained, "I'm obsessed, no doubt. We're dying out. Our people are dying out. I feel compelled to do something." (R. **26**, 16).

After these revelations the court ordered an evaluation for trial competency. (R. **26**, 18). However, since Cross had not yet insisted in self-representation, there was no

evaluation or consideration given as to whether he met the higher standard of competency set forth in *Edwards* for self-representation.

In December, 2014, he was examined, and found competent to stand trial. (R. **31**, 4). There is no reference to a mental diagnosis. However, on February 6, 2015, defense counsel reported that Mr. Cross had been uncooperative with their psychologist, who was a combat veteran like Mr. Cross. (R. **26**, 21). Counsel was concerned that Mr. Cross would try, in the second phase of trial, to present his position that the Declaration of Independence gave him the legal right to kill Jews. This, counsel explained, was the state's best aggravating factor against him. (R. **26**, 23-24). Nevertheless, Mr. Cross steadfastly maintained that he could convince the jury that what he had done was "perfectly justified." (R. **26**, 25, 33). And he requested "leeway" to "try the Jews" in the trial. (R. **26**, 33).

At another hearing he wanted to fire his newly appointed attorneys to gain internet access. (R. **34**, 34-35). He also insisted on a speedy trial, even after his attorneys informed the court that compliance with the speedy trial deadline would render them unprepared and therefore incompetent to represent him. (R. **34**, 43). At a waiver-of-counsel hearing, Mr. Cross told the court he did not trust his attorneys who he believed worked for the "enemy." (R. **35**, 15). He persisted in his desire to fire his attorneys, hoping the court would thereby grant him internet access. (R. **35**, 20). At a later hearing, on May 14, 2015, he told the court he was a martyr and promised, "I'll show you how to die. I'll show you how a real man dies." (R. **36**, 17).

More conspiracy theory:

Mr. Cross' first attempt at courtroom self-representation, which concerned the defense's motion to suppress evidence, demonstrated that he was unable to maintain a focus on the legal issues. He pointed out that the police officer inside the community center was a coward for not confronting Mr. Cross, the shooter. (R. **37**, 26-28). He tried to cross-examine witnesses about their knowledge of attacks against Jews worldwide and persisted in talking about the millions of Muslims killed by the United States. (R. **37**, 50). In the middle of the hearing, Mr. Cross was overcome with frustration and simply gave up. He asked to withdraw the motion to suppress, stating, "This is just a waste. Utterly, utterly." (R. **37**, 113). Later, he clarified to the court that his defense was "compelling necessity" because the Jews were wiping out his people. The court warned him that the defense may not be allowed at trial. (R. **37**, 158).

Mr. Cross' behavior up to this point should have raised a serious concern that undisclosed mental issues would continue to impair Mr. Cross' ability to provide himself competent representation. His legal arguments to this point, like his criminal acts, appear to have been influenced by paranoia or delusion, and were inept and legally irrelevant. *Mr. Cross' motions were additional signals of a mental disorder.*

More signals of a mental disorder appeared in June and July, 2015, as he began filing motions. The *pro se* motion filed by the defendant in *Edwards* was used by the Supreme Court to illustrate that the defendant was "gray-area" incompetent for purposes of self-representation. Likewise, any of Mr. Cross' written motions cast doubt on his mental competence to self-represent.

In his first motion, he asked for "acquittal of all charges" based on the Declaration of Independence because, "The white race is dying out." (R. **5**, 161). In his "Motion to Compel District Attorney to Provide Discovery Info", he states, "I remind the court that [District Attorney] Howe is a highly paid accomplice of the Jewish Occupation Government (JOG)." (R. **5**, 167). In his "Motion for Hearing of my Complaint of Obstruction of Justice," he began expressing his belief that the judge was a "Mason":

> Judge Ryan is a Mason. When I asked him to his face on 17 June, 'Are you a Mason?' he got angry and loud when he replied 'shut up,' and words to the effect of 'it's none of your business.' This convinced me he is, in fact, a Mason. The Masons are led and controlled by jews. It matters not that low ranking Masons are ignorant of that fact...**I move that Judge Ryan remove himself from my case on the grounds that he is a high ranking Mason**. If he swears in open court, and under oath, that he is not, then I might reconsider this particular motion.

(R. **5**, 169-170) (emphasis added).

Appellant submits that upon receipt of these bizarre accusations, Judge Ryan had full discretion under *Edwards* to have Mr. Cross examined for *Edwards*-competency, hold a hearing on the issue, and end Mr. Cross' ability to proceed *pro se*.

Mr. Cross' next batch of motions filed in July were no more coherent. The "Motion for Private Researcher" states that he did not trust his stand-by attorney Martin Warhurst, and wanted him dismissed to save the taxpayers money. He offered to cancel his motion for a private psychiatrist, if the court would in turn permit him to hire his grammar school friend. He listed no qualifications of his friend. (R. **5**, 217).

In a motion captioned "Defendant's Response Brief," he accused Judge Ryan of writing a "secret" note, and predicted that Judge Ryan would "simply deny me an on-line computer in short, vague, 'masonic' jibberishes, while he's draped in that GD black

masonic robe I so despise." (R. **5**, 219-220). It concludes, "Judge Ryan... Swear you are not a high ranking mason. In appreciation, I will withdraw my charges of obstruction of justice, and I will allow you to continue to sit in judgment of me." (R. **5**, 220).

In a motion for "Acknowledgment of Chosen Defense," he predicted, "[Judge] Ryan will consequently, assure my defeat when he rules against this motion on 17 July. Why? Because he's a willing accomplice of the JOG (Jewish Occupation Government)." (R. **5**, 221). He continues, predicting "the collapse":

> When the collapse comes, what do you think the 'people of color' will do, write their congressmen? Are you crazy? Even the dooms-day preppers plan to head for the hills and hide, while refusing to fight and while surrendering all military bases and arms and ammo to 'people of color', including nukes.

(R. **5**, 222).

Mr. Cross also referenced an officer's observations when Mr. Cross was taken into custody: "He [Cross] said he did not fear death at all. He said he was a *political prisoner*, and he did what his honor demanded, and that he was ready to go." (R. **5**, 227) (emphasis added). His last motion expressed unbridled optimism that his chosen defense—deemed irrelevant by everyone else—would win the case, "I can meet all the prerequisites required by law relative to a compelling necessity defense...which, if granted, will ultimately free me from incarceration." (R. **5**, 230).

At motions hearing Mr. Cross displays more impaired thinking.

The motions hearing on July 17, 2015, served to confirm these signs of delusional thinking. There, Mr. Cross told the court he would dismiss his motion to recuse the court, if the court "would just simply answer a simple question: Are you a high-ranking member of the Masons?" Cross explained, "That's a secret organization. As a defendant

should have a right to know if you're member of a secret, subversive organization or not." (R. **38**, 6). He next informed the court that since Mr. Cross was a "Nazi" it would be unreasonable for a Jew to sit on the case. (R. **38**, 68).

In objecting to the idea that the prosecution would get to argue first and last, Mr. Cross eventually chastised the prosecution for even suggesting it: "He [prosecutor] ought to be tried for treason in my opinion. Judge." (R. **38**, 84). His legal argument against the prosecution arguing first and last was that "George Washington and Alexander Hamilton" would not rule in the prosecution's favor. (R. **38**, 86). Mr. Cross spent an extremely lengthy time arguing a motion for judgment of acquittal, based on the Declaration of Independence. (R. **38**, 124-155).

Impaired thinking bore on his ability to represent himself because of his constant conviction that he could convince the jury of his irrelevant justification-defense. As the prosecution recognized in a response to his chosen defense: "There is no relationship whatsoever between these victims and the worldwide conspiracy alleged in the defendant's pleadings." (R. **5**, 214).

No determination of the issue by the court.

Mr. Cross' conviction that he was a political prisoner in a world-wide conspiracy was incompatible with the clear-headed thinking required to defend a capital case. In cases from other jurisdictions, where trial courts failed to determine whether a "gray area" defendant could competently represent himself, appellate courts have remanded for that determination. In *State v. Jason*, 779 N.W.2d 66 (Iowa Ct. App. 2009), a defendant who had Asperger's Syndrome was allowed to represent himself. The trial court

conducted an extensive colloquy concerning the voluntariness of the decision, including his lack of legal training and the "high stakes" involved. However, the trial court did not consider that there might be a limit to the defendant's right to self-representation under the *Edwards* standard.

Under these circumstances, the appeals court noted, "other courts have remanded the proceedings to the trial court to conduct a hearing to determine the defendant's competency to represent himself or herself." The defendant was not hindered academically by his Asperger's, but the Court was concerned that his actions throughout the trial constituted a manifestation of the symptoms of Asperger's, and he may be a "gray-area" defendant who was competent to stand trial, but not competent to take on the expanded role of representing himself at trial. 779 N.W.2d at 76.

> We remand to the trial court for a hearing to determine whether it would have denied Jason's right to represent himself at trial in light of the standards established in *Edwards* and subsequent cases that have recognized a constitutional violation when a defendant who is not competent to present his own defense without the help of counsel is allowed to do so.

779 N.W.2d at 76.

In *United States v. Ferguson*, 560 F.3d 1060, 1066 (9th Cir. 2009), the defendant represented himself *pro se* in a criminal trial. He exhibited "bizarre" behavior during pre-trial proceedings but made it clear to the court he wanted to represent himself. 560 F.3d at 1061-1064. Since the trial court did not consider whether the *Edwards* decision should have precluded self-representation, the *Ferguson* court remanded:

> Defendant's actions suggest that he might have been "unable to carry out the basic tasks needed to present his own defense without the help of counsel." Id. at 2386. Furthermore, Defendant's complete failure to defend himself seriously jeopardized the fairness of the trial and sentencing hearing and, at the very least, seriously

> jeopardized the appearance of fairness. Id. at 2387. Perhaps most importantly, the record suggests that the district court might have forced counsel upon Defendant, had the court had the benefit of reading *Edwards*... Ultimately, however, we cannot accurately determine from the record whether the district court would have operated differently with the benefit of *Edwards*. Fortunately, we need not divine the district court's hypothetical conclusions.

560 F.3d at 1069

In *State v. Connor*, 292 Conn. 483, 525, 973 A.2d 627, 654 (2009), the defendant was convicted of crimes including kidnapping and robbery. The *Connor* court considered whether the defendant was entitled to a new trial because he lacked the ability, due to mental illness or incapacity, to perform the basic functions necessary for the trial of his case.

The trial court in *Connor* had conducted a lengthy colloquy concerning his self-representation, and determined that he was articulate and lucid. 292 Conn. at 503. However, he had suffered a stroke and had difficulties during trial. For example, he asked a prospective juror a long-winded, confusing question, and he repeatedly referred to extraneous matters, including that corrections officers intended to kill him. 292 Conn. at 504. The court held:

> Although we acknowledge that the right of self-representation exists primarily "to affirm the dignity and autonomy of the accused"; (internal quotation marks omitted) *State v. Brown,* 256 Conn. 291, 302, 772 A.2d 1107, cert. denied, 534 U.S. 1068, 122 S.Ct. 670, 151 L.Ed.2d 584 (2001); we believe that that interest is outweighed by the interest of the state, the defendant and the public in a fair trial when, due to mental illness, the defendant is incompetent to conduct trial proceedings without the assistance of counsel. We therefore conclude that, when a trial court is presented with a mentally ill or mentally incapacitated defendant who, having been found competent to stand trial, elects to represent himself, the trial court also must ascertain whether the defendant is, in fact, competent to conduct the trial proceedings without the assistance of counsel.

State v. Connor, 292 Conn. at 527–28

It remanded the case for the trial court to determine competency under the *Edwards* standard. 292 Conn. at 528.

In *State v. Lane*, 362 N.C. 667, 669 S.E.2d 321 (2008), order clarified, 706 S.E.2d 775 (N.C. 2009), the defendant was sentenced to death. The court noted that the appellant had raised an *Edwards* competency issue. Without analysis, it remanded for a hearing based on *Edwards*, for the trial judge to determine whether the defendant came within the category of "borderline-competent" (or "gray-area") defendants, and whether the court in its discretion would have precluded self-representation for defendant and appointed counsel for him pursuant to *Indiana v. Edwards*. 362 N.C. at 668.

Mr. Cross' self-representation did not affirm Mr. Cross' dignity, but was more of the type of spectacle the Supreme Court warned against in *Indiana v. Edwards*. When he wasn't filing motions accusing the court of being a high ranking Mason, he was peppering prospective jurors with questions about a one-world government. (R. **41**, 134-137; 243-246).

To determine whether Mr. Cross was a gray-area defendant, who was unable "to carry out the basic tasks needed to present his own defense without the help of counsel," *Edwards* at 2386, it is necessary to consider what those "basic tasks" are. In death penalty litigation the tasks are considerable, and include, for example, screening the defendant for mental disorders. ABA Guidelines, 31 Hofstra L. Rev. 913 at 956-959 (2003). Mr. Cross could not very well screen himself for a delusional disorder.

The desire to self-represent, must also be analyzed in light of the Supreme Court's requirement that capital trials carry an element of enhanced reliability distinct from other

criminal proceedings. *Woodson v. North Carolina*, 428 U.S. 280, 305, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976) (Because of the qualitative difference between the death penalty and life imprisonment "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

The heightened reliability required of capital verdicts and sentences led states to adopt stringent requirements for attorneys representing defendants facing the ultimate punishment. These were outlined in the prior issue on *pro se* representation. Attorneys untrained in capital litigation are not competent to represent defendants in capital trials, nor are defendants who would need to investigate and prepare from inside jail. Added to these concerns, Mr. Cross' mental issues made competent self-representation highly improbable. His unwavering goal of presenting the jury with the conspiracy-justification, permeated every aspect of the case, starting prior to trial and continuing through his final closing argument.

The defendant in *Indiana v. Edwards* was charged with attempted murder, battery with a deadly weapon, criminal recklessness, and theft. *Edwards*, 554 U.S. at 167. None of these crimes can leave a criminal defendant susceptible to a sentence of death upon conviction. If, under those facts, curtailment of self-representation rights was permissible, the trial court in this case should have assessed whether Mr. Cross' right to proceed *pro se* should have been curtailed based on irrational behavior he began displaying months prior to trial. *Edwards*, 554 U.S. at 177–78 ("We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental

capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so.").

The case should be remanded for the court to determine whether Mr. Cross should have been permitted to represent himself under the *Edwards* standard.

Issue No. 5: The trial court committed reversible error, in violation of Mr. Cross' rights under the Due Process Clause of the Fourteenth Amendment, and K.S.A. 22-4508 when it denied Mr. Cross' request for funds for a jury consultant.

Introduction and Standard of Review

Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the defendant in a death penalty proceeding has the right to a "life-qualified" jury, an impartial jury from which potential jurors who would automatically impose the death penalty upon conviction have been excluded. That constitutional provision – along with K.S.A. 22-4508 – also gives the indigent criminal defendant the right to funds for expert services necessary for an effective defense. Mr. Cross' request for funds for a jury consultant was summarily denied by the trial court, without consideration of whether a jury consultant was necessary for an adequate defense.

A trial court's decision regarding funds for expert services in a criminal trial is reviewed for abuse of discretion. *State v. Lumbrera*, 252 Kan. 54, Syl. ¶ 8, 845 P.2d 609 (1992). An abuse of discretion occurs when a judicial action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *State v. Marshall*, 303 Kan. 438, 445, 362 P.3d 587 (2015). Additionally, an abuse of discretion occurs when a trial court fails to consider the factors given by the higher courts to guide

its determination. *Dragon v. Vanguard Industries, Inc.*, 277 Kan. 776, 789, 89 P.3d 908 (2004).

Procedural Background and Preservation for Review

At an ex parte hearing on June 17, 2015, the trial court discussed the role of stand-by counsel with Mr. Cross. Mr. Cross told the court that he needed help with jury selection. (R. **15**, 4-5). Stand-by counsel told the court that they were willing to review juror questionnaires with Mr. Cross and draw his attention to areas in the questionnaires that he should follow up during voir dire. (R. **15**, 15). Stand-by counsel also told the court that Mr. Cross wished to hire a jury consultant to assist him.

> Finally, he has asked – On top of Counsel assisting in voir dire and reviewing the jury questionnaires, he does want to hire a jury consultant.
>
> We're – We use one from Lawrence, Kansas named Bret Dillingham, although he is quite expensive; 20-$30,000.
>
> I don't know if he's available, and I don't know if he would take this case on. I don't know if he could be prepared within sixty days.
>
> But he has asked for a jury consultant.

(R. **15**, 34-35).

The court ordered stand-by counsel to assist Mr. Cross with the review and scoring of juror questionnaires and to assist in the voir dire process. (R. **15**, 39). The court denied the request for the jury consultant. (R. **15**, 49).

Mr. Cross made no proffer as to why a jury consultant was necessary for an effective defense. Should this Court find the record not adequate under normal appellate rules to preserve this issue for review, this Court should review the issue under K.S.A.

21-6619(b) which mandates this Court, in a death penalty appeal, consider any errors asserted in the review and appeal regardless of whether the issue was preserved below.

Discussion

Mr. Cross had a constitutional right to a voir dire adequate to seat a life-qualified jury.

In *Witherspoon v. Illinois*, 391 U.S. 510, 512–13, 518, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968), the United States Supreme Court found that the Sixth and Fourteenth Amendments to the United States Constitution did not permit the execution of a defendant, based on a verdict rendered by a jury from which any venireman who had qualms about imposing the death penalty had been eliminated for cause. 391 U.S. 518. The Court refined this decision in *Wainwright v. Witt*, 469 U.S. 412, 424–26, 83 L.Ed.2d 841, 105 S.Ct. 844 (1985), holding that a prospective juror may be excluded for cause when his or her views on capital punishment would prevent or substantially impair the performance of their duties as a juror in accordance with their instructions and oath.

Then, in *Morgan v. Illinois*, 504 U.S. 719, 721, 119 L.Ed.2d 492, 112 S.Ct. 2222 (1992) the Supreme Court held that a trial court may not refuse to allow inquiry into whether a potential juror would automatically impose the death penalty upon conviction of the defendant. This was referred to as a "life qualifying" or "reverse-*Witherspoon*" inquiry. 504 U.S. 724. The Court stated, "[B]ased on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. **If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence**." 504 U.S. 729 (emphasis added).

The Court further explained, "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors...*Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." 504 U.S. 729-730 (internal citations and quotations omitted). The Court concluded that the Constitution guarantees voir dire adequate to discover and challenge these jurors 504 U.S. 733-734. *Mr. Cross had a constitutional and statutory right to funds for expert services necessary for an effective defense.*

In *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed.2d 53, 105 S.Ct. 1087 (1985) the United States Supreme Court found that under the Due Process Clause of the Fourteenth Amendment, an indigent criminal defendant is entitled to the assistance necessary to prepare an effective defense. In *Ake*, the defendant's request for funds to hire a psychiatrist to determine his sanity at the time of the offenses was denied by the trial court. He was convicted and sentenced to death. 470 U.S. 72-73. The Supreme Court reversed, holding that under those circumstances, the Constitution required that the State provide access to a psychiatrist's assistance. 470 U.S. 74, 76. The Court stated, "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." 470 U.S. 77.

The Court set out a three-factor standard to determine when the state must provide funds for expert assistance which requires the trial court consider: (1) the private interest that will be affected by the action of the State; (2) the governmental interest that will be affected if the safeguard is to be provided; and, (3) the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. 470 U.S. 77.

In *Ake*, the Supreme Court framed the issue as "whether the Constitution requires that an indigent defendant have access to the psychiatric examination **and assistance necessary to prepare an effective defense** based on his mental condition, when his sanity at the time of the offense is seriously in question." 470 U.S. 70. Our statute regarding the provision of expert services to indigent defendants, K.S.A. 22-4508, contains similar language.

> An attorney other than a public defender who acts as counsel for a defendant who is financially unable to obtain investigative, expert or other **services necessary to an adequate defense** in the defendant's case may request them in an *ex parte* application addressed to the district court where the action is pending. Upon finding, after appropriate inquiry in the *ex parte* proceeding, that the services are necessary and that the defendant is financially unable to obtain them, the district court shall authorize counsel to obtain the services on behalf of the defendant.

(emphasis added).

The trial court abused its discretion when it denied Mr. Cross' request for a jury consultant without considering the three factors set out in Ake, or making an appropriate inquiry under K.S.A. 22-5408.

The trial court denied Mr. Cross' request for a jury consultant without considering the *Ake* factors. As this Court has stated, an abuse of discretion occurs when a trial court

fails to properly consider the factors given by a higher court to guide its discretionary decision. *Dragon*, 277 Kan. 789.

Likewise, under K.S.A. 22-4508 funds for expert or other services are to be provided for indigent defendants "upon a finding by the court, **after appropriate inquiry**, that they are necessary to an adequate defense." *State v. Burnett*, 222 Kan. 162, 164–65, 563 P.2d 451 (1977)(emphasis added). The request of an indigent defendant for funds to provide supporting services "is to be measured by the requirements of due process, the test of which is 'fundamental fairness'" *State v. Campbell*, 210 Kan. 265, Syl. ¶ 5, 500 P.2d 21 (1972).

No inquiry was made into whether a jury consultant was necessary for an effective defense or to meet the requirement of fundamental fairness in this case. The court's failure to inquire constituted an abuse of discretion.

An appropriate Ake inquiry would have revealed the necessity of a jury consultant for an effective defense.

The first factor in the *Ake* analysis is the private interest that will be affected by the action of the State. In *Ake*, the Court stated, "The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling." 470 U.S. 78. As in *Ake*, this is a death penalty case, rendering Mr. Cross' interest "uniquely compelling."

The second factor is the governmental interest that will be affected if the safeguard is to be provided. The Court found, "it is difficult to identify any interest of the State, other than that in its economy, that weighs against recognition of this right." 470 U.S. 79.

The Court found that the government's interest in denying the defendant the assistance of a psychiatrist was not substantial, "in light of the compelling interest of both the State and the individual in accurate dispositions." 470 U.S. 79. Once again, as in *Ake*, the only interest of the State that weighs against the provision of the expert service is financial, and given that the State also has interest in a fair and accurate outcome, the government interest in denying the defendant expert assistance is not substantial. 470 U.S. 79.

The final factor is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. When the *Ake* Court considered the probable value of the assistance and the risk of error if it was not offered, the Court considered "the pivotal role that psychiatry has come to play in criminal proceedings." 470 U.S. 79. The Court found that without the assistance of a psychiatrist the risk of an inaccurate resolution of sanity issues was extremely high. 470 U.S. 82.

Likewise, in this case, without the assistance of a jury consultant, the risk that Mr. Cross would be unable to empanel an impartial life-qualified jury was extremely high. The American Bar Association has promulgated guidelines to assist counsel in the protection and implementation of the constitutional rights recognized in *Morgan*. In its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Revised Edition February 2003 (hereinafter Guidelines), the recommendations for the jury selection portion of a capital trial stress the difficult task of selecting a jury and the importance of expert assistance:

B. Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques: (1) **for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable**.

C. **Counsel should consider seeking expert assistance in the jury selection process.**

Hofstra Law Review Vol. 31: 1049, Guideline 10.10.2 (emphasis added).

The Commentary to the Guidelines states in part:

Jury selection is important and complex in any criminal case. In capital cases, it is all the more critical. Counsel should devote substantial time to determining the makeup of the venire, preparing a case-specific set of voir dire questions, planning a strategy for voir dire, and choosing a jury most favorable to the theories of mitigation that will be presented. **Given the intricacy of the process and the sheer amount of data to be managed, counsel should consider obtaining the assistance of an expert jury consultant.**

Counsel's jury selection strategy should minimize the problem of "death qualified" juries that result from exclusion of potential jurors whose opposition to capital punishment effectively skews the jury pool not only as to imposition of the death penalty but as to conviction. **Case law stemming from Supreme Court decisions that address capital jury selection procedures has resulted in a highly specialized and technical procedure. As a practical matter, the burden rests with defense counsel to "life qualify" a jury. Counsel should conduct a voir dire that is broad enough to expose those prospective jurors who are unable or unwilling to follow the applicable sentencing law, whether because they will automatically vote for death in certain circumstances or because they are unwilling to consider mitigating evidence. Counsel should also develop a strategy for rehabilitating those prospective jurors who have indicated opposition to the death penalty.**

Hofstra Law Review Vol. 31:1051-1053 (emphasis added).

The trial court abused its discretion when it summarily denied Mr. Cross' request for a jury consultant without a proper inquiry that would have revealed that this

assistance was necessary for an effective defense. As will be discussed, Mr. Cross was unable, on his own, to life-qualify his jury.

This Error Requires Reversal

To obtain a reversal based on the trial court's erroneous denial of funds for expert services, the defendant must show prejudice to his or her substantial rights. *Lumbrera*, 252 Kan. 54, Syl. ¶ 8. Because Mr. Cross' Eighth and Fourteenth Amendment rights are implicated, this Court applies the constitutional harmless error standard of *Chapman v. California*, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct.824 (1967). *State v. McCullough*, 293 Kan. 970, 971, 270 P.3d 1142, 1149 (2012). Before federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt; the beneficiary of the constitutional error must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *State v. Ward*, 292 Kan. 541, 556, 256 P.3d 801, 813 (2011).

The record in this case reveals a voir dire not adequate to life-qualify the jury. Before jury selection began, Mr. Cross told the trial court that he had spoken with stand-by counsel about the procedure for voir dire, and he felt he "got a pretty good idea." (R. **41**, 4). Subsequent events proved him wrong.

Peremptory challenges were eventually exercised against the first four panels passed for cause. (R. **43**, 119-120; **44**, 10-11, 29). Mr. Cross' voir dire of the first three panels reflected complete ignorance regarding the process and purpose of voir dire, as well as the "highly specialized and technical procedure" of capital jury selection. When

he examined the final panel, it was clear that standby counsel had stepped in and given him some advice, but it was too little, too late.

As noted the ABA Guidelines state that counsel should be familiar with techniques for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them potentially excludable. Mr. Cross' voir dire demonstrated that he had no understanding of this technique, or the reason for it. When the prosecutor moved to strike Jurors Numbered 10, 69, 72, 87 and 67 from the first and second panels for cause due to their opposition to the death penalty, Mr. Cross, instead of trying to rehabilitate them, argued with them, questioning their patriotism, and religious beliefs. They were all excused for cause. (R. **41**, 120-123, 193-195, 198-200, 207-210, 211-214). He did not even question Jurors 73, 66, and 46, who were also removed for cause due to their opposition to the death penalty. Mr. Cross changed his tactics with the third and fourth panel, asking Jurors 199, 89, and 135, who opposed the death penalty, to try to stay on the jury to save his life. (R. **42**, 82-84, 90-93, 190-193). They were all excused for cause as well. (R. **42**, 86, 96, 194).

Mr. Cross' comments to the trial court before the third panel was examined revealed a fundamental misunderstanding of the jury selection process. He complained that the trial judge had assured him that there would be people who opposed the death penalty on his jury and that instead, the judge was automatically kicking them off. (R. **42**, 64-66).

During the voir dire of the final panel, Mr. Cross received some information, presumably from stand-by counsel, about life-qualifying a jury. Mr. Cross told the court:

> What [the jurors] haven't been told is there's several things that has to happen before they are even required to consider the death penalty. **I didn't even know that myself until just a few minutes ago**. They've got to prove how many aggravating circumstances at least?

(R. **42**, 210)(emphasis added).

Standby counsel told the court he had explained questions that Mr. Cross could ask potential jurors on the subject of the death penalty. (R. **42**, 211).

Mr. Cross complained that no one had explained to the jurors that before they considered imposing a sentence of death they had to find that aggravating circumstances were not outweighed by mitigating circumstances, and he requested that all the jurors who had been excused for cause because they stated they could not vote for the death penalty be recalled, so that he could explain it to them, stating, "**I think some of them are recoverable**. They would make good witnesses and it would at least provide me with maybe one or two that's got a little bit of doubt about killing me." (R. **42**, 212, 226)(emphasis added). His motion was denied and the court told Mr. Cross that he could have brought up his issues with the jurors during his questioning, but he had failed to do so. Mr. Cross repeated that he didn't know about the process until that day. (R. **42**, 218).

After stand-by counsel had given Mr. Cross information about the process and the parties returned to the courtroom, questioning was renewed with Juror 174 and, although that juror was eventually excused for cause, Mr. Cross made relevant objections to the prosecutor's questions. (R. **42**, 228-232, 235).

The ABA Standards also require counsel be familiar with techniques to expose jurors who would automatically impose the death penalty. Mr. Cross clearly did not

understand this either. Juror 22 expressed strong support for the death penalty, but the prosecutor moved on quickly when he said he could follow the law. Mr. Cross did not follow up with this juror during his voir dire, to determine if, despite his statements, he would automatically impose a sentence of death. (R. **41**, 115-116). Juror 79 stated that if it was proven beyond a reasonable doubt that the defendant committed the crime, the death penalty should be imposed. Mr. Cross made no inquiry. (R. **42**, 80). This was true with Juror 164 as well, who stated he was in favor of the death penalty if the defendant was found guilty. (R. **42**, 239).

Mr. Cross' portion of voir dire was not designed to identify jurors who would automatically impose a sentence of death upon conviction. Instead, his questions to the first and second panels asked for attitudes regarding "the mainstream media," (R. **41**, 131-134, 240-243); one world government (R. **41**, 134-137, 243-246); whether the white race had a right to survive (R. **41**, 137-139, 246-250) and America's relationship with Israel. (R. 41, 139-141). When questioning the second panel, he argued with two jurors about German law targeting Holocaust deniers. (R. **41**, 246-250, 256-257, 259-261). When he questioned the third panel, he asked for juror's views on one world government, whether the jurors supported violent resistance in support of American sovereignty, and whether they feared government surveillance (R. **42**, 104-114). He asked if anyone left on the panel felt they would violate their Christian beliefs if they voted to impose a sentence of death on him. (R. **42**, 114). He asked jurors if they had an opinion regarding which racial group commits the most violent crimes and white supremacists and whether the white race has the right to survive. (R. **42**, 116-126).

After having the process explained to him, Mr. Cross changed his voir dire questions for the last panel, asking jurors if they understood they were not required to impose a sentence of death, just consider it, and asking about their understanding of the process. (R. **42**, 241-252, 277-279). Mr. Cross finally moved to excuse two jurors for cause who appeared to hold automatic death penalty positions. (R. **42**, 235, 252-253, 261-267).

Mr. Cross' performance during the voir dire of the first three panels demonstrates that he was in great need of assistance in choosing a fair impartial jury to determine if he should live or die. His change in tactics part way through the final panel demonstrates that, had he had assistance from a jury consultant, he would have taken that consultant's advice and this Court could be more confident that the jury selected to determine his sentence was fair and impartial in accordance with the Sixth and Fourteenth Amendments to the United States Constitution.

Issue No. 6: Prosecutorial error in closing argument requires reversal of Mr. Cross' sentence of death.

Introduction and Standard of Review

While prosecutors are allowed wide latitude in closing argument, that latitude does not extend to misstatements of law. In this case, the prosecutor made repeated assertions that factors other than Mr. Cross' actual *conduct* surrounding the offenses established that the killings were committed in a heinous, atrocious or cruel manner. Those assertions were based on a misstatement of the plain words of the statute defining the heinous, atrocious or cruel aggravating circumstance.

To determine whether prosecutorial error in closing argument has occurred, the reviewing court must first decide whether the argument fell outside the wide latitude afforded prosecutors. If error is found, the court must then determine if the error prejudiced the defendant's due process rights to a fair trial. *State v. Sherman*, 305 Kan. 88, 88–89, Syl. ¶ 7, 378 P.3d 1060 (2016). Prosecutorial error can be considered harmless if the State proves beyond a reasonable doubt that the error complained of did not affect the outcome of the trial in light of the whole record. 305 Kan. 88-89, Syl. ¶ 8.

Procedural Background and Preservation for Review

The State relied on two aggravating circumstances to support a sentence of death: that Mr. Cross knowingly or purposely killed or created a great risk of death to more than one person, and that *he committed the crime* in an especially heinous, atrocious or cruel manner. (R. **5**, 231-232).

In closing argument, the prosecutor asserted that factors *other than Mr. Cross' conduct* during the offenses established that the crimes were committed in a heinous, atrocious or cruel manner, specifically, Mr. Cross' motive, demeanor at trial and lack of remorse, as well as Reat Underwood's age. He relied on the "any other conduct" aspect of K.S.A. 21-6624(f) to make this argument:

> **(PROSECUTOR):** ...
> The other thing that is listed on here is conduct which is heinous, atrocious, or cruel can be anything else that you, as jurors, in considering all the evidence, find is especially heinous. And I submit to you, ladies and gentlemen, that **you can factor in that this is a hate crime, that his actions are basically generated by his hate for the Jewish people.**
>
> **THE DEFENDANT:** Objection. It's my understanding, Judge, there is no hate crime law in Kansas. Or am I wrong?

THE COURT: Objection's overruled.
You may continue.

(PROSECUTOR): When you look at the definitions of heinous, extremely wicked, or shockingly evil, what better description is there of what the defendant did on that day than shockingly evil and wicked?

When you look at his evidence and his testimony in this case, ladies and gentlemen, **recall his demeanor** and what he said and what he did. **Recall that he sat there on the stand and spoke with a smile on his face and chuckled and gleefully recalled what he did that day. That is heinous, extremely wicked, and shockingly evil.**

The evidence shows that he went out to kill as many people as he could that day and that **it was based on his hate for the Jewish people.** You heard his statements after his arrest in the car. **He was proud of what he did.** His total indifference to other people's lives, the ones he took and the ones he threatened that day.

And let's remember a quote he said on that one jail tape. "Moments after killing these people I've never felt such exhilaration, overpowering joy, total, absolute freedom." **There is a total lack of remorse by the defendant and acknowledgment of the heinous acts that he did on that day**.

(R. **49**, 39-41)(emphasis added).

When discussing Mr. Cross' mitigating circumstances, the prosecutor stated:

The next thing is mitigators two and eight. Two and eight being his belief system. The mitigator of **his belief system and why he acted the way he did, we submit is actually an aggravator and actually supports our aggravating circumstances based on his hatred of the Jews** and his definition of people that he believes don't have a right to exist.

(R. **49**, 43)(emphasis added).

(PROSECUTOR): And recall the one jail tape where someone suggested to him, why don't you apologize to the families? And what was his response? "I ain't gonna goddamn apologize to those people. They should know better than to hang out with the goddamn Jews." Those he killed he described as accomplices of the Jews. They should know better than to hang out with the Jews.

And then his comment of, "Every Jew will now know my name."

And then we heard from the stand the defendant say, "Ya'll can hate me, but if I had to do it over again, I'd still do it. You're damn right I would. If they ever let me out of here I'll continue."

That's not acceptance of responsibility. That's not an acknowledgment of doing anything wrong, whatsoever. This is a person who is a proud person

– a person proud of his actions, proud of what he did to these people at the Jewish Community Center and Village Shalom.

Folks, you got to see first-hand during this trial what a hate crime looks like. Its foundation is based on hate of others who are different than him. None of these victims, including these three individuals or anybody else at the Jewish Community Center or Village Shalom, did anything to justify his actions. The only thing they did was to treat people the same without concern of their race, their religious beliefs, at a Jewish facility.

(R. **49**, 44-46)(emphasis added).

Additionally, when discussing the mitigating circumstance of Mr. Cross' poor health, the prosecutor turned that into an aggravating circumstance by linking it to his motive:

> What's interesting about that is, that is the very motivating factor of why he did what he what he did that day. If you recall, he felt concerned about his health and so it was his health and his age which drove him to do these things. He indicated that if I don't do it now, I never will. As he drove away he said he doubled back because it was now or never. **So, really, the mitigator is actually the nexus behind why he committed these crimes on April 13**.

(R. **49**, 41)(emphasis added).

Discussing the "mental anguish" aspect of the heinous, atrocious or cruel aggravating circumstance, the prosecutor argued:

> We don't know if Reat heard the blast. Even the defendant admitted he probably did. We don't know if he looked at the defendant before he was shot. **But we know that Reat was a 14-year-old boy**.

(R. **49**, 34)(emphasis added).

Mr. Cross objected when the prosecutor first argued motive as evidence of the aggravating circumstance. (R. **49**, 40). He did not lodge further objections to similar argument, after his objection was overruled. He did not object to the other argument set out here. A contemporaneous objection is not necessary to preserve for appellate review a question of prosecutorial error during closing argument. *State v. King*, 288 Kan. 333, 349,

204 P.3d 585 (2009). However, Mr. Cross' objection, along with the trial court's ruling on it, are relevant to this Court's due process and harmless error analysis.

Discussion

That a killing was motivated by racial or religious animus is not an aggravating circumstance under Kansas law. Nor is the victim's age, the defendant's demeanor at trial, or lack of remorse. Nevertheless, the prosecutor told Mr. Cross' sentencing jury that these facts were evidence that the crime was heinous, atrocious or cruel, relying on K.S.A. 21-6624(f)(7) which allows the jury to find that aggravating circumstance based on "**any other conduct** the trier of fact expressly finds is especially heinous." (emphasis added).

The prosecutor misstated subsection (f)(7) when he told the jury "The other thing that is listed on here is conduct which is heinous, atrocious, or cruel can be **anything** else that you, as jurors, in considering all the evidence, find is especially heinous." (R. **49**, 39) (emphasis added). The statute refers to conduct. Motive, demeanor at trial, the victim's age and lack of remorse are not conduct.

This distinction is important, as limiting definitions are essential to render the use of the "heinous, atrocious or cruel" aggravating circumstance constitutional in a death penalty proceeding. In *Maynard v. Cartwright*, 486 U.S. 356, 361–62, 100 L.Ed.2d 372, 108 S.Ct. 1853 (1988), the United States Supreme Court found that the aggravating circumstance that a murder is "heinous, atrocious and cruel" is, standing alone, unconstitutionally vague under the Eighth Amendment, because it does not adequately inform jurors what they must find to impose the death penalty, leaving them with the

open-ended discretion found unconstitutional in *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972). *Maynard*, 486 U.S. 361–62. The Court further held that state courts can cure this constitutional defect by adopting a limiting instruction. 486 U.S. 359–60.

In *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001) *overruled on other grounds as recognized in Kansas v. Marsh*, 548 U.S. 163, 165 L.Ed.2d 429, 126 S.Ct. 2516 (2006)(*Kleypas I*), this Court upheld the "heinous, atrocious or cruel" aggravating circumstance against a challenge that it was unconstitutionally vague because it included a narrowing definition. 272 Kan. 1025. This Court found that in order to find that a murder was committed in a heinous, atrocious, or cruel manner, the jury must find that the perpetrator inflicted mental anguish or physical abuse before the victim's death, therefore the statute narrowed the class of death eligible defendants as required by the Eighth and Fourteenth Amendments to the United States Constitution. 272 Kan. 902, Syl. ¶¶ 54, 55. This Court repeated and affirmed this analysis of the "heinous, atrocious, or cruel" aggravating circumstance in its second *Kleypas* opinion. *State v. Kleypas*, 305 Kan. 224, 382 P.3d 373 (2016)(*Kleypas II*).

In this case the prosecutor erroneously misquoted the constitutionally-required limiting definition of "heinous, atrocious and cruel" to expand it to factors unrelated to the defendant's conduct during the offense. Further, some of the prosecutor's arguments directly contradict this Court's interpretation of that aggravating circumstance.

This Court has specifically rejected the position that a defendant's motive can establish that a killing was committed in a heinous, atrocious or cruel manner. In *Kleypas I* this Court stated:

> The heinous, atrocious, or cruel manner aggravating circumstance in K.S.A. 21–4625 is not targeted toward the motive for the killing but, rather, focuses on the manner in which the killing was committed.

272 Kan. 894, 904–05, Syl. ¶ 68.

Likewise, this Court rejected, in *State v. Follin*, 263 Kan. 28, 51, 947 P.2d 8 (1997), the position that the victim's young age could render a killing heinous, atrocious or cruel:

> Finally, the State seems to suggest that the tender ages of the victims contribute to the atrocious manner in which the murders were committed. No authority is cited for the proposition. The plain language of the statute does not support the State's suggestion. The focus is on defendant's conduct, on his actions as he killed the victims. It is not on the nature of the victim.

The prosecutor's arguments were contrary to the plain words of the statute and this Court's interpretations of that aggravating circumstance. Those arguments misstated the law. Misstating the law is not within the wide latitude given to prosecutors in closing argument. *State v. Bunyard*, 281 Kan. 392, 406, 133 P.3d 14 (2006) *disapproved of on other grounds by State v. Flynn*, 299 Kan. 1052, 329 P.3d 429 (2014).

Once the reviewing court has determined that a prosecutor's remark exceeded the latitude allowed in closing argument, the court must determine if the error prejudiced the defendant's due process rights to a fair trial. *Kleypas II*, 305 Kan. 316. A misstatement of the law by the prosecutor denies the defendant a fair trial when the facts are such that the

jury could have been confused or misled by the statement. *State v. Henry*, 273 Kan. 608, 619, 44 P.3d 466 (2002).

The prosecutor clearly and unequivocally told the jury, several times, that Mr. Cross' motive, lack of remorse and demeanor rendered the killings heinous, atrocious, or cruel. When Mr. Cross objected to the motive argument, the court overruled his objection, signaling to the jury that the prosecutor was correct in his assertions. Under these circumstances, the jury was certainly misled.

The prosecutor's arguments placed non-statutory aggravating circumstances into consideration for the jury, contrary to Kansas law. *Kleypas I*, 272 Kan. 1116 ("It is …clearly improper to attempt to introduce a nonstatutory aggravating circumstance."); K.S.A. 21-6624 ("Aggravating circumstances shall be limited to the following…"). In *Brown v. Sanders*, 546 U.S. 212, 219–20, 163 L.Ed.2d 723, 126 S.Ct. 884 (2006) the United States Supreme Court held:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

None of the aggravating circumstances specified in K.S.A. 21-6624 allow for the consideration of motive, demeanor at trial, lack of remorse, or age of the victim as an aggravating circumstance. Therefore, under *Brown*, the sentence imposed on Mr. Cross was unconstitutional, in violation of the Eighth Amendment.

This error requires reversal.

Prosecutorial error is harmless if the State proves beyond a reasonable doubt that the error complained of did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict. *Kleypas II*, 305 Kan. 316.

Mr. Cross concedes that the aggravating circumstance of K.S.A. 21-6624(b) (death or great risk of death to more than one person) is established by the evidence. But the existence of at least one aggravating circumstance only takes the jury to the next task, weighing any aggravating circumstances against the defendant's mitigating circumstances. See, K.S.A. 21-6617(e).

The State argued forcefully and repeatedly that Mr. Cross' motive, demeanor and lack of remorse proved that the crimes were committed in a heinous, atrocious or cruel manner. When the trial court overruled Mr. Cross' objection, that argument was underscored.

The fact that the prosecutor frequently returned to these themes demonstrates that he believed they provided strong support for Mr. Cross' execution. The State cannot now be heard to argue that there is no reasonable possibility that these arguments contributed to the verdict of death, which reflects the value judgment of the individual jurors. The prosecution cannot establish that the jurors' individual reactions to Mr. Cross' motive, demeanor at trial, or Reat Underwood's age played no role in the verdict they rendered. See, *Kansas v. Carr*, ___U.S.___, 193 L.Ed.2d 535, 136 S.Ct. 633 (2016): "In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve." 136 S.Ct. 642. The effect of

the improper consideration was no doubt amplified by the prosecution's argument that when Mr. Cross proffered his beliefs as a mitigating factor, the jury should consider them an aggravating circumstance: "The mitigator of his belief system...we submit is actually an aggravator…" (R. **49**, 43).

Mr. Cross' sentence of death must be reversed due to the uncorrected prosecutorial error that led the jury to improperly consider and weigh Mr. Cross' motive, demeanor at trial, lack of remorse and Reat Underwood's age as aggravating circumstances.

Issue No. 7: Mr. Cross' sentence of death must be vacated as it was based in part on the unconstitutionally vague provisions of K.S.A. 21-6624(f), in violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution and Section Nine of the Kansas Constitution Bill of Rights.

Introduction and Standard of Review

To comport with the Eighth and Fourteenth Amendments, a death penalty statute must adequately inform jurors what they must find to impose a sentence of death, and not leave them with open-ended discretion. The United States Supreme Court has held that the aggravating circumstance that an offense is heinous, atrocious or cruel, standing alone, fails to meet this standard. However, the heinous, atrocious or cruel aggravating circumstance can be rendered constitutional through a narrowing definition or a limiting construction.

Mr. Cross was sentenced to death based in part on the jury's finding that his offense was committed in a heinous, atrocious or cruel manner. The jury was instructed first with a narrowing definition of that aggravating circumstance that this Court has

approved of. However, the jury was then given a further instruction that negated the limiting instruction by expanding the definition of conduct which is heinous, atrocious or cruel *to any conduct* that the jurors found to be heinous. Instead of narrowing the concept of heinous conduct, this "definition" came full circle by defining the vague term with the same vague term, leaving the jury with unconstitutional open-ended discretion.

The source of the circular definition is K.S.A. 21-6624(f)(7). That subsection of the statute is unconstitutional, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, and Section Nine of the Kansas Constitution Bill of Rights. Because Mr. Cross' sentence of death was based in part on that unconstitutional provision, it must be vacated.

The constitutionality of a statute is a question of law, over which this Court exercises unlimited review. *State v. Charles*, 304 Kan. 158, 176, 372 P.3d 1109 (2016).

Procedural Background, Reviewability and Standing

As noted in Issue No. 6, the State notified Mr. Cross that it would rely on the statutory aggravating circumstances that Mr. Cross knowingly or purposely killed or created a great risk of death to more than one person, and that he committed the crime in an especially heinous, atrocious or cruel manner to support his execution. The notice further stated:

> Conduct which is heinous, atrocious or cruel may include, but is not limited to:
>
> . . .
>
> * K.S.A. 21-6624(f)(7): Any other conduct the trier of fact expressly finds is especially heinous.

(R. **5**, 231-232).

The court's penalty phase instruction regarding aggravating circumstances – Instruction 6 - included this language. (R. **5**, 383).

As set out in Issue No. 6, the State relied heavily on the "any other conduct" provisions of K.S.A. 21-6624(f)(7) when arguing that the crime was committed in a heinous, atrocious or cruel manner, and Mr. Cross' sentence of death was based, in part, on that aggravating circumstance. (R. **5**, 391; R. **49**, 39).

The constitutionality of K.S.A. 21-6624(f)(7) was not challenged in the district court. Generally, constitutional issues cannot be raised for the first time on appeal. *State v. Coman*, 294 Kan. 84, 89, 273 P.3d 701 (2012). However, this claim involves a question of law based on uncontested facts, and resolution of the claim may, depending on this Court's review for harmless error, be determinative of the question of Mr. Cross' sentence. Additionally, consideration of the claim is necessary to prevent the denial of fundamental rights, bringing the claim within the exceptions to the general rule. *State v. Hawkins*, 285 Kan. 842, 176 P.23d 174 (2008). Further, in this death penalty case, under K.S.A. 21-6619(b) this Court must consider any errors asserted in the review and appeal regardless of whether the issue was preserved below.

As demonstrated by the procedural history, Mr. Cross has standing to raise the constitutionality of K.S.A. 21-6624(f)(7) because the statute was applied unconstitutionally in his case. See, *State v. Papen*, 274 Kan. 149, 162, 50 P.3d 37 (2002).

Discussion

As discussed in Issue No. 6, in *Maynard v. Cartwright*, 486 U.S. 356, 361–62, 100 L.Ed.2d 372, 108 S.Ct. 1853 (1988), the United States Supreme Court found that the

aggravating circumstance that a murder is "heinous, atrocious and cruel" is, standing alone, unconstitutionally vague under the Eighth Amendment, because it does not adequately inform jurors what they must find to impose the death penalty, leaving them with the open-ended discretion found unconstitutional in *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972). *Maynard*, 486 U.S. 361–62. The Court further held that state courts can cure this constitutional defect by adopting a limiting construction. *Maynard*, 486 U.S. 359–60.

Section Nine of the Kansas Constitution Bill of Rights, which prohibits the infliction of "cruel or unusual punishment" is generally construed by this Court in the same manner as the Eighth Amendment, and so would also require that a sentencing statute adequately inform jurors what they must find to impose the death penalty. See, *State v. Scott*, 265 Kan. 1, Syl. ¶ 1, 961 P.2d 667, 668 (1998)("The Cruel and Unusual Punishment Clauses of the Eighth Amendment to the United States Constitution and § 9 of the Kansas Constitution Bill of Rights are nearly identical and are to be construed similarly.")

In *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001) *overruled on other grounds as recognized in Kansas v. Marsh*, 548 U.S. 163, 165 L.Ed.2d 429, 126 S.Ct. 2516 (2006)(*Kleypas I*), this Court upheld the "heinous, atrocious or cruel" aggravating circumstance against a challenge that it was unconstitutionally vague because it included a narrowing definition. 272 Kan. 1025. This Court found that because a finding that a murder was committed in a heinous, atrocious or cruel manner required the jury find that the perpetrator inflicted mental anguish or physical abuse *before the victim's death*, the

statute narrowed the class of death eligible defendants as required by the Eighth and Fourteenth Amendments to the United States Constitution. 272 Kan. 902, Syl. ¶¶ 54, 55.

However, the statute approved in *Kleypas I* has been amended, expanding the definitions of conduct that can prove that a crime was committed in a heinous, atrocious or cruel manner. Those amendments mirror amendments previously made to the Hard 50 statute. In an interlocutory appeal taken in the *Kleypas* case, this Court discussed the amendments to the Hard 50 statute regarding that aggravating circumstance, and how they differ from the death penalty aggravating circumstance, which have since made their way into the death penalty statute:

> Prior to 1999, both statutes described the heinous, atrocious, or cruel aggravating factors identically, stating only the requirement that "[t]he defendant committed the crime in an especially heinous, atrocious or cruel manner." See K.S.A. 21–4625(6); K.S.A. 21–4636(f). The consistent interpretation of this phrase in connection with the then hard 40 penalty was that it required that the victim suffer serious physical abuse or mental anguish before death. See, *e.g., State v. Follin,* 263 Kan. 28, 49–51, 947 P.2d 8 (1997).
>
> …the legislature passed L.1999, ch. 138, sec. 1 (H.B.2440), which amended K.S.A. 21–4636(f) by adding the following language:
> "A finding that the victim was aware of such victim's fate or had conscious pain and suffering as a result of the physical trauma that resulted in the victim's death is not necessary to find that the manner in which the defendant killed the victim was especially heinous, atrocious or cruel. In making a determination that the crime was committed in an especially heinous, atrocious or cruel manner, any of the following conduct by the defendant may be considered sufficient:
> …
> (7) **any other conduct in the opinion of the court that is especially heinous, atrocious or cruel."** K.S.A.2005 Supp. 21–4636(f).
>
> No similar amendment was made to the heinous, atrocious, or cruel aggravating circumstance contained in K.S.A. 21–4625(6). Further, review of the legislative history indicates that H.B. 2440 was not meant to affect K.S.A. 21–4625(6). See Testimony of Representative Kent Glasscock, sponsor, before House Judiciary Committee, March 3, 1999 (stating that the bill "does not change the aggravating factors for capital punishment").

State v. Kleypas, 282 Kan. 560, 566–567, 147 P.3d 1058 (2006)(emphasis added).

The question of the constitutionality of those amendments with regard to the death penalty was not before this Court in the *Kleypas* interlocutory appeal. However, this Court did restate that the narrowing definition or interpretation that required serious physical abuse or mental anguish before death satisfies the requirement, for the death penalty, that the aggravating circumstance provide the sentencer with a principled means of guiding its discretion. 282 Kan. 561, Syl. ¶ 8.

K.S.A. 21-4625 was repealed in 2010. 2010 Session Laws of Kansas Ch. 136. It was replaced with K.S.A. 21-6624, which incorporated the language defining "heinous, atrocious or cruel" that had been previously added to the Hard 50 statute. 2010 Session Laws of Kansas, Ch. 136 § 264. This included the language, "any other conduct the *court* expressly finds is especially heinous." (emphasis added). The Hard 50 provisions that were moved to the death penalty statute were enacted before our Hard 50 statute was determined to be unconstitutional, in violation of the Sixth Amendment. *State v. Soto*, 299 Kan. 102, 103, ¶ 9, 322 P.3d 334 (2014)("Kansas' statutory procedure for imposing a hard 50 sentence … violates the Sixth Amendment … because it permits a judge to find … the existence of one or more aggravating factors necessary to impose an increased mandatory minimum sentence, rather than requiring a jury to find the existence of the aggravating factors ….").

Thus, provisions written for application by judges in Hard 50 cases were transferred to a statute meant to guide jurors in death penalty cases. This created the problem described by the United States Supreme Court in *Walton v. Arizona*, 497 U.S.

639, 646, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990) *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 153 L.Ed.2d 556, 122 S.Ct. 2428 (2002). *Walton* concerned a sentencing judge's finding that a murder was "especially heinous, cruel or depraved" under the Arizona death penalty statute. The Supreme Court noted, "Especially heinous, cruel or depraved" is facially vague. 497 U.S. 654-655. However, the Arizona Supreme Court had previously adopted a narrowing definition. The Court found that when the sentencer is a judge, and the appellate courts have properly narrowed the definition, the sentencing judge is presumed to have applied the narrower definition. 497 U.S. 653. In contrast, the Court explained:

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. **It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.**

497 U.S. 653 (emphasis added).

The inclusion of subsection (f)(7) renders our "heinous, atrocious or cruel" aggravating circumstance unconstitutionally vague because this circular definition - *heinous conduct is conduct you consider to be heinous* - gives the jury open-ended discretion with no guidance. By defining the vague term with the same vague term, the jury is given no new information about what the vague term means, or how it is limited. As this Court observed in *State v. Jones*, 298 Kan. 324, 332, 311 P.3d 1125, 1132 (2013) "The statutory definition of 'criminal prosecution' to include a 'prosecution' tells us nothing." See, *State v. Barlow*, 303 Kan. 804, 816, 368 P.3d 331, 340 (2016)(referring to the statutory definition in *Jones* as a "circular definition.")

Based on this unconstitutionally vague statute, the jury was instructed in equally vague language that heinous, atrocious or cruel conduct is anything the jury considers to be heinous. By allowing the jurors to define heinous, atrocious or cruel in any way that struck them as appropriate, that sub-division of the statute negated the effect of the narrowing definitions that rendered the statute constitutional. Under this definition, the jurors could determine that the killings were committed in a heinous, atrocious or cruel manner merely because they were intentional or premeditated, the very problem identified by the United States Supreme Court in *Maynard*, "To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" 486 U.S. 364.

As noted in Issue No. 6, this provision of the statute was used by the prosecutor to support his arguments to the jury that Mr. Cross' motive, demeanor at trial, and lack of remorse, as well as Reat Underwood's age, made the killings heinous, atrocious or cruel.

And while the prosecutor did not specifically argue that instances of Mr. Cross' conduct years before the events of April 13 should be used as evidence of that aggravating circumstance, the jurors may have done so. The prosecutor drew their attention to conduct that they may have considered heinous:

> Another mitigator is his military service. And I grant you that he was a good soldier. That he did most of what he was asked to do by the United States military.

> However, I'm sure his officers would not have given him such high marks if they would have known that **he was going out with his other military buddies and beating up black prostitutes, which he admitted to**.

(R. **49**, 42)(emphasis added).

Additionally, the prosecutor reminded the jury that Mr. Cross had been arrested in the past "by the Federal authorities with guns and explosives on his person which he intended to use but was stopped before he was able to employ his mission." (R. **49**, 43).

The danger that the jury based its finding that the killings were committed in a heinous, atrocious and cruel manner on improper considerations is increased by the fact that all three of these deaths were shooting deaths, which are generally not sufficient to support this aggravating circumstance:

> Standing alone, the fact that the victim was killed by gunshots fired by the defendant is generally not sufficient to support a finding that the manner of death was especially heinous, atrocious, or cruel for purposes of imposing a hard 50 sentence pursuant to K.S.A.2005 Supp. 21–4636(f).

State v. Baker, 281 Kan. 997, 998, Syl. ¶ 17, 135 P.3d 1098 (2006).

In most cases, for a shooting death to be heinous, atrocious or cruel, there must be some element of mental anguish inflicted on the victim before the victim's death. 281 Kan. 1020. Dr. Corporan and Reat Underwood were shot without warning, Dr. Corporan died instantly and Reat Underwood was rendered unconscious a moment after being shot. (R. **22**, 130-132; 150-151). Ms. Lamanno was aware that she was in danger before Mr. Cross shot her, but the jury might have rejected that aggravating circumstance because there was no evidence that Mr. Cross intended for Ms. Lamanno to suffer mental anguish or physical pain. The delay between Ms. Lamanno's perception of danger and her death

was not purposeful, rather, it was caused by the failure of Mr. Cross' shotgun to discharge.

As set out in Issue No. 6, the United States Supreme Court has held that when an invalidated sentencing factor is considered in the sentencing process that results in a sentence of death, that sentence is unconstitutional, unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances. *Brown v. Sanders*, 546 U.S. 212, 219–20, 163 L.Ed.2d 723, 126 S.Ct. 884 (2006). Given that the unconstitutional provisions of K.S.A. 21-6624(f)(7) gave the jurors unlimited discretion to consider any conduct they wished, it cannot be said that the jury only considered conduct described by other sentencing factors. And, as described in Issue No. 6, those jurors were erroneously told by the prosecutor that they should consider Mr. Cross' motive, demeanor at trial, lack of remorse and Reat Underwood's age as evidence supporting the heinous, atrocious and cruel aggravating circumstance. Therefore, the sentence imposed on Mr. Cross was unconstitutional, in violation of the Eighth Amendment and Section Nine of the Kansas Constitution Bill of Rights.

This error requires reversal.

As in Issue No. 6, Mr. Cross concedes that the aggravating circumstance of K.S.A. 21-6624(b) (death or great risk of death to more than one person) is established by the evidence. But the existence of at least one aggravating circumstance does not render the error harmless.

For the same reasons advanced in Issue No. 6, the prosecution cannot show there is no reasonable possibility that the State's use of the unconstitutional provisions of K.S.A.

21-6624(f)(7) contributed to the verdict of death. Mr. Cross' sentence of death must be reversed.

Issue No. 8: The trial court committed reversible error when it excluded relevant mitigating evidence from the penalty phase of Mr. Cross' trial, in violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution, Section Nine of the Kansas Constitution Bill of Rights and K.S.A. 21-6617.

Introduction and Standard of Review

The defendant in a death penalty proceeding has the right, under the federal constitution, the state constitution and Kansas statutes, to present relevant evidence in mitigation of punishment. Kansas law recognizes that acceptance of responsibility for a crime is a circumstance that mitigates punishment, and that a guilty plea to the crime is substantial competent evidence of that mitigating circumstance. Mr. Cross proffered, as evidence of his acceptance of responsibility, his two offers, made well before trial, to plead guilty to all charges in exchange for a sentence of life without parole. The trial court committed reversible error when it excluded this evidence.

A trial court's decisions regarding the admission of evidence are reviewed for abuse of discretion. *State v. Gonzalez*, 282 Kan. 73, 80, 145 P.3d 18 (2006). An evidentiary decision based on an erroneous interpretation of the law can be an abuse of discretion. *State v. Adams*, 280 Kan. 494, 504, 124 P.3d 19 (2005). The trial court's determination that Mr. Cross' offers to plead guilty were not admissible as mitigation was based on an erroneous interpretation of law, and was thus an abuse of discretion.

Procedural Background

This issue arose at trial when, in the guilt phase, Mr. Cross began his opening statement by saying, "Look, I've tried twice to make a deal with the Prosecutor." (R. **21**, 18). The prosecutor immediately objected, and argued that evidence of prior plea negotiations are inadmissible. The trial court agreed. (R. **21**, 19-20).

Mr. Cross attempted again to inform the jury of his offers to plead guilty in his penalty phase opening. Once again, the prosecutor objected and argued that the plea offers were not mitigating circumstances, and the trial court agreed. (R. **47**, 36).

Mr. Cross tried to place this evidence before the jury during his penalty phase testimony: "I submitted a plea bargain offer. I'll read it to you. It was – I had an attorney by the name of Ron Evans at the time --" (R. **47**, 51). The prosecutor objected again, on the same grounds. Mr. Cross argued that this evidence was relevant to his mitigating circumstances. (R. **47**, 51). The court sustained the objection. (R. **47**, 52).

Later that day, Mr. Cross argued that his offer to plead guilty was evidence of acceptance of responsibility and admissible in the penalty phase. He cited *United States v. Fell*, 372 F.Supp.2d 773 (2005), *United States v. Biagg*, 909 F.2d 662 (1990) and *Johnson v. United States*, 860 F.Supp.2d 633 (2012), as supporting authority. He said he wanted to proffer his correspondence offering to plead guilty. The court took it under advisement. (R. **47**, 130-131).

The correspondence in question was made part of the record on appeal the next day. (R. **19**, 19, 31). (Appendix D: Defense Exhibits). Defendant's Exhibit J, dated June 5, 2014, is a letter from Ron Evans, who was representing Mr. Cross at the time. It

conveyed an offer to plead guilty to all state charges, as well as anticipated federal hate crimes, in return for life without parole. (R. **50**, Defendant's Exhibit J). Defendant's Exhibit K, dated April 10, 2015, is a letter from Mark Manna, who had replaced Mr. Evans as counsel for Mr. Cross, and conveyed a similar offer. (R. **50**, Defendant's Exhibit K).

After taking the issue under advisement, the trial court ruled that the documents would not be admitted into evidence and that Mr. Cross would not be allowed to testify that he offered to plead guilty in return for life without parole: "Nothing about that plea bargain offer can be presented to the jury." (R. **48**, 8-9).

This issue was preserved for appellate review.

Mr. Cross' proffer of the excluded evidence preserved his claim of error. See, *State v. Evans*, 275 Kan. 95, Syl. ¶ 3, 62 P.3d 220, 221 (2003). However, he did not specifically articulate his constitutional grounds when arguing he had the right to present this evidence. Nevertheless, this Court should consider his constitutional arguments as this issue falls within one of the three recognized exceptions to the general rule that constitutional violations cannot be raised for the first time on appeal: consideration of the claim is necessary to serve the ends of justice and to prevent a denial of fundamental rights. Further, the claim involves only a question of law arising on proved facts that are not in dispute by the parties. *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068, 1070 (2015).

Additionally, under K.S.A. 21-6619(b) this Court must, in a death penalty appeal, consider any errors asserted in the review and appeal regardless of whether the issue was preserved below.

Discussion

Under the Eighth and Fourteenth Amendments to the United States Constitution, the capital defendant has the right to place before the sentencer any relevant evidence "that might serve 'as a basis for a sentence less than death.'" *Skipper v. South Carolina*, 476 U.S. 1, 5, 90 L.Ed.2d 1, 106 S.Ct. 1669 (1986) *quoting Lockett v. Ohio*, 438 U.S. 586, 604, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978). See also, *Eddings v. Oklahoma*, 455 U.S. 104, 113–14, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982)(the sentencer may not be precluded by law from considering any mitigating factor, nor may the sentencer refuse to consider, as a matter of law, any relevant mitigating circumstance) and *Hitchcock v. Dugger*, 481 U.S. 393, 398–399, 95 L.Ed.2d 347, 107 S.Ct. 1821 (1987)(under *Skipper*, *Eddings* and *Lockett*, the sentencer may not be precluded from considering evidence of nonstatutory mitigating circumstances).

Section Nine of the Kansas Constitution Bill of Rights, which prohibits the infliction of "cruel or unusual punishment" is generally construed by this Court in the same manner as the Eighth Amendment, and so also guarantees the capital defendant's right to present relevant evidence in mitigation. See, *State v. Scott*, 265 Kan. 1, Syl. ¶ 1, 961 P.2d 667, 668 (1998)("The Cruel and Unusual Punishment Clauses of the Eighth Amendment to the United States Constitution and § 9 of the Kansas Constitution Bill of Rights are nearly identical and are to be construed similarly.")

Kansas law provides that in a capital sentencing proceeding, evidence shall include matters relating to any mitigating circumstances and that mitigating circumstances are not limited to those enumerated by statute. K.S.A. 21-6617(c); K.S.A. 21-6625(a).

This Court has determined that acceptance of responsibility is an appropriate mitigating circumstance in sentencing, and that a guilty plea to the crime is substantial competent evidence of acceptance of responsibility. *State v. Jolly*, 301 Kan. 313, 328, 342 P.3d 935, 946 (2015). This Court has also held that acceptance of responsibility, as evidenced by a guilty plea, is an appropriate nonstatutory departure factor under the Kansas Sentencing Guidelines. *State v. Bird*, 298 Kan. 393, 398-400, 312 P.3d 1265 (2013).

In *Bradshaw v. Stumpf*, 545 U.S. 175, 186, 162 L.Ed.2d 143, 125 S.Ct. 2398 (2005), a case involving a motion to withdraw plea, the United States Supreme Court recognized that acceptance of responsibility, as evidenced by a guilty plea, is a valid argument in mitigation in a death penalty case when it commented: "the plea allowed Stumpf to assert his acceptance of responsibility as an argument in mitigation." See also, *McElroy v. State,* 865 N.E.2d 584, 591 (Ind. 2007)(a defendant who pleads guilty deserves some mitigating weight be given to the plea in return); and *United States v. Whitten*, 610 F.3d 168, 195 (2d Cir. 2010)(noting federal Sentencing Guidelines treat acceptance of responsibility – usually through a plea of guilty – as a basis for leniency).

As previously set out, Mr. Cross cited *United State v. Fell*, 372 F.Supp.2d 773 (D.Vermont 2005) as authority for his position that he should be able to inform the jury

that he had offered to plead guilty. In *Fell*, the defendant and the prosecutor drafted a plea agreement allowing the defendant to plead guilty in return for a sentence of life without parole. However, the United States Attorney General rejected the agreement, and the death penalty prosecution proceeded. 372 F.Supp.2d 781-782. The Government moved, pretrial, to exclude information about the plea negotiations at trial, while Mr. Fell argued that they should be admitted during the penalty phase. 372 F.Supp.2d 782.

The court determined that the prosecution's statements regarding the mitigating factors contained in the draft plea agreement should not be admitted into evidence, reasoning that the prosecutor's beliefs regarding aggravating or mitigating circumstances should have no bearing on the jury's evaluation of those factors. 372 F.Supp.2d 783.

However, the court agreed with Mr. Fell's argument that his offer to plead guilty for life without parole was evidence relevant to the mitigating factor of acceptance of responsibility. The court explained, "It is Fell's *offer* to plead guilty that bears on his acceptance of responsibility. The Government's *response* to Fell's offer is not relevant." 372 F.Supp.2d 784 (emphasis in original).

In *Johnson v. United States*, 860 F.Supp.2d 663 (N.D. Iowa 2012), the federal district court found that a capital defendant's attorneys had performed deficiently in failing to attempt to introduce her offer to plead guilty to a life sentence as mitigating evidence showing acceptance of responsibility. 860 F.Supp.2d 903–04. The court adopted the reasoning of *Fell*, stating:

> Where the offer to plead guilty *comes from the defendant,* it may or may not be illuminating of the circumstances of the offense or the defendant's prior record, but

> it does have some bearing on the defendant's character and, more specifically, on the defendant's acceptance of responsibility for the charged offense.

Johnson, 860 F.Supp.2d 903 (emphasis in original).

Under Kansas law, the state constitution and the federal constitution, Mr. Cross had the right to present the jury with his offers to plead guilty, as evidence in support of the mitigating circumstance of acceptance of responsibility. The trial court abused its discretion when it excluded this evidence.

This Error Requires Reversal.

This Court should not conduct a harmless error review.

In *Lockett v. Ohio*, the Supreme Court found that an Ohio statute limiting the sentencer's consideration of mitigation to statutory factors violated the Eighth and Fourteenth Amendments. 438 U.S. 604-606, 608. The Court reversed the petitioner's death sentence, without conducting a harmless error review. 438 U.S. 608–09.

In *Eddings v. Oklahoma*, the sentencing judge refused to consider the petitioner's difficult childhood in mitigation. 455 U.S. 108-109. The Court found this violated the holding of *Lockett*. *Eddings*, 455 U.S. 113-114, 117. The Court reversed the sentence of death without a harmless error review, stating:

> On remand, the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. **We do not weigh the evidence for them.** Accordingly, the judgment is reversed to the extent that it sustains the imposition of the death penalty, and the case is remanded for further proceedings not inconsistent with this opinion.

455 U.S. 117 (emphasis added).

Finally, in *Skipper v. South Carolina*, the Supreme Court reversed the petitioner's sentence of death after the trial court excluded evidence of the defendant's good behavior

in prison, finding that the court's ruling was contrary to its prior holding in *Lockett* and *Eddings*. *Skipper*, 476 U.S. 4-5. As in those cases, the Court did not conduct a harmless error review, instead it stated:

> The exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender. The resulting death sentence cannot stand…

476 U.S. 8–9.

In each case, relevant mitigating evidence was excluded from the sentencer's consideration and the Court reversed without a harmless error analysis. In this case, relevant mitigating evidence was excluded from the sentencer's consideration and this Court should, likewise, reverse without a harmless error review. This Court should not conduct its own weighing, because this Court should not attempt to step into the shoes of the sentencing jury and guess what effect the excluded evidence would have had on each individual juror's decision regarding the weight of aggravating vs. mitigating circumstances.

In the usual harmless error analysis, the reviewing court must determine if an error affected the outcome of the trial. Frequently, the answer to that question turns on whether the evidence against the defendant was overwhelming. *State v. King*, 297 Kan. 955, 986–87, 305 P.3d 641 (2013). While this approach is appropriate when this Court is deciding the effect of an error on a factual determination, it is not appropriate when the question is whether an error affected the weight given to aggravating vs. mitigating circumstances by each individual juror because that determination is a value judgment. See, *Kansas v. Carr*, ___U.S.___, 193 L.Ed.2d 535, 136 S.Ct. 633, 642 (2016)("Whether mitigation

exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained.").

A harmless error review would substitute the values of each individual Justice for that of the jurors. If the evidence is non-cumulative, as in this case, this Court becomes the first fact-finder to weigh this evidence, contrary to the decisions of the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348 (2000)(any fact that increases penalty for crime beyond prescribed statutory maximum is a functional equivalent of an element of a greater offense and must be submitted to jury and proved beyond reasonable doubt); *Ring v. Arizona*, 536 U.S. 584, 153 L.Ed.2d 556, 122 S.Ct. 2428 (2002)(aggravating factors in a capital trial which render defendant eligible for the death penalty operate as functional equivalents of elements of a greater offense as described in *Apprendi*, and must be submitted to jury and found beyond a reasonable doubt); and recently, *Hurst v. Florida*, ___U.S.___, 193 L.Ed.2d 504, 136 S.Ct. 616 (2016)(under *Apprendi* and *Ring*, the finding that aggravating factors are not outweighed by mitigating factors is also treated as an element, it must be made by jury, beyond a reasonable doubt).

In this case, a mitigating circumstance, acceptance of responsibility, supported by evidence, was entirely excluded from the jury's consideration. This is not a situation in which the jurors were aware of Mr. Cross' offer and assigned it little weight. If that were the case, it *might* be appropriate for this Court to affirm the jury's decision on the

grounds that its determination was supported by the record. But to affirm in this case, in which the sentencer was completely unaware of this mitigating circumstance, would make this Court the original sentencer, in violation of the principles behind the *Apprendi*, *Ring*, and *Hurst* decisions.

In the alternative, this Court should find the error in the exclusion of Mr. Cross' non-cumulative evidence of acceptance of responsibility was not harmless.

In *Hitchcock v. Dugger*, the United States Supreme Court reversed the petitioner's sentence of death because the advisory jury was instructed to not consider non-statutory mitigating circumstances, in violation of its decisions in *Lockett*, *Eddings* and *Skipper*. *Hitchcock*, 481 U.S. 398-399. The Court then stated:

> Respondent has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge. In the absence of such a showing our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid.

481 U.S. 399.

Some courts have taken this language to mean that a harmless error analysis is appropriate for *Lockett* or *Hitchcock* type error. See, *Clark v. Dugger*, 834 F.2d 1561, 1569-70 (11th Cir.1987)(*Lockett* violation can be harmless); *State v. Daughtry*, 340 N.C. 488, 518–19, 459 S.E.2d 747 (1995)(*Lockett* error in exclusion of evidence regarding defendant's remorse harmless beyond a reasonable doubt, as other evidence of remorse admitted).

Should this Court decide to apply a harmless error analysis, the test for the review was stated in *State v. Kleypas*, 305 Kan. 224, Syl. ¶ 13, 382 P.3d 373 (2016):

> The standard of review and the ultimate question that must be answered with regard to whether error in the penalty phase of a capital trial was harmless is whether the court is able to find beyond a reasonable doubt that the error did not affect the weighing of the aggravating and mitigating circumstances—that is, that there is no reasonable possibility the error affected the jury's weighing of the aggravating and mitigating circumstances and the death sentence verdict.

At trial, Mr. Cross admitted that he was the person who intentionally shot and killed Reat Underwood, William Corporan and Theresa Lamanno. The jurors who heard these admissions were unaware that he had been willing to plead guilty, leaving them no doubt wondering why he was putting the surviving victims, witnesses and their families through the ordeal of the trial. In fact, during jury selection, one member of the venire expressed this sentiment:

> **Juror 183:** If you did it, do the honorable thing and save the taxpayers of this state and county the money and the effort and the heartbreak of these families, plead to guilty, spend the rest of your life in prison. You're going to die in prison one way or another by needle or natural causes and get this circus over with. That's how I feel.

(R. **43**, 108).

This venireman did not sit on the jury, nor did any member of this venire panel. (R. **43**, 119-120; **44**, 10-11, 29). However, the potential juror expressed a logical and predictable point of view: if the defendant does not deny the allegations, why put the State to this expense, why put the survivors through this heartbreak. Mr. Cross' proffered evidence would have answered the venireman's question – he would have spared everyone the expense, and the heartbreak, of this trial in return for life without parole. Or, to put it in the venireman's words, he tried to do the honorable thing. The fact that he tried to accept responsibility and "get [the] circus over with," may have led one or more jurors to extend mercy to him, and impose a sentence of life.

The prejudice was exacerbated when the prosecutor urged the jurors to consider Mr. Cross' demeanor on the witness stand:

> He feels justified and is proud of what he did. There's no remorse.

(R. **49**, 44).

> This is a person who is a proud person – a person proud of his actions, proud of what he did to these people at the Jewish Community Center and Village Shalom.

(R. **49**, 45).

Jurors could have concluded Mr. Cross was using the trial as a stage to express his beliefs, and have viewed this as an aggravating circumstance – See Issue No. 6 - while ignorant of the fact that Mr. Cross took the stage only because the State wanted to execute him. Under these circumstances this Court cannot find that there is no reasonable possibility that the exclusion of evidence that Mr. Cross would have waived his right to a trial in return for a sentence of life without parole affected the jury's weighing of the aggravating vs. mitigating circumstances. Mr. Cross' sentence of death must be reversed due to the improper exclusion of non-cumulative mitigating evidence from the jury's consideration.

Issue No. 9: The failure to instruct the jury on Mr. Cross' mitigating circumstance prevented the jury from having a proper vehicle to express its reasoned moral response to Mr. Cross' mitigating evidence.

Standard on Review

Determining whether a requested instruction was legally appropriate is examined using an unlimited review. Whether there was sufficient evidence to support giving the

instruction is viewed in the light most favorable to the defendant or requesting party. *State v. Smyser*, 297 Kan. 199, 203, 299 P.3d 309, 313 (2013).

Preservation

At the penalty phase instructions conference, Mr. Cross requested the instruction that: "The capacity of the Defendant to conform his conduct to the requirements of law was substantially impaired." (R **20**, 85). The Court denied it. (R. **20**, 91).

Background

The prosecutor objected to the defendant's proposed instruction, arguing that what was relevant was not his mental condition, but rather his belief system. (R. **20**, 87, 91). But Mr. Cross correctly stated, "It's my whole defense, I proved that on the stand in two days. I was sub impaired. I was distraught." (R. **20**, 86). The court denied the proposed instruction because it dealt with mental illness, and "here was no issue about mental illness." (R. **20**, 87).

Discussion

In *Penry v. Lynaugh*, 492 U.S. 302, 327–28, 106 L.Ed.2d 256, 109 S.Ct. 2934, 2951 (1989), the United States Supreme Court found that the absence of instructions regarding mitigating evidence of Penry's mental retardation and abused background prevented the jury from being provided with a vehicle for expressing its "reasoned moral response" to the mitigating evidence in rendering its sentencing decision. *Penry*, 492 U.S. at 328–29, 109 S.Ct. at 2952. Accord *Hitchcock v. Dugger*, 481 U.S. 393, 396, 95 L.Ed. 2d 347, 107 S.Ct. 1821 (1987) (reversible error occurred because the trial court's

instructions on mitigating factors did not encompass the evidence of mitigators that the defendant presented and argued to the jury).

The Kansas statute also requires that this mitigator be given. K.S.A. 21-6625, states that mitigating circumstances "shall include" that:

> (6) ***The capacity*** of the defendant to appreciate the criminality of the defendant's conduct or ***to conform the defendant's conduct to the requirements of law was substantially impaired***." [Emphasis added]

Mr. Cross stated he was not submitting his proposed instruction for the jury to consider mental deficiency (R. **20,** 87). This is not a question of I.Q. It is a question of paranoia and delusion, or other serious mental issues. His mental capacity to conform to the law was clearly impaired to some degree. His actions rested on a world-wide conspiracy theory where he believed he was acting like George Washington by protecting our freedoms. (R. **17**, 52). He rationalized mistakenly killing people who were not his enemy by saying they were "accomplices" of the enemy because they were at the community center. (R. **18**, 80). This paranoid and delusional thinking was confirmed by his bizarre behavior and statements throughout trial, as has been set forth in other issues, and suggests serious mental illness, although undiagnosed.

The Error Requires Reversal

Harmless error should not apply, as set forth in Issue No. 8, because the error completely precluded consideration of mental mitigating evidence. If, however, it does apply, since Mr. Cross' Eighth and Fourteenth Amendment rights are implicated, this Court applies the constitutional harmless error standard of *Chapman v. California*, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967). Thus, the error must be found to be

harmless beyond a reasonable doubt. The evidence that he was affected by paranoia or delusion was mitigating. See *Rose v. State*, 675 So.2d 567, 573 (Fla.1996)("we have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order.") There were no instructions that allowed the jury to give effect to mental health mitigation. Had the instruction been given, at least one juror may have concluded that Mr. Cross should be spared the death penalty because of the influence of persistent delusional and paranoid thinking that influenced his actions.

Issue No. 10: Cumulative error requires the reversal of Mr. Cross' sentence of death.

The cumulative effect of the errors in this case resulted in a penalty phase trial that was constitutionally inadequate to produce a reliable result, requiring reversal of Mr. Cross' sentence of death. When determining whether cumulative error requires the reversal of a defendant's sentence …

> …this court must consider whether it is able to find that the total cumulative effect of the errors, viewed in the light of the record as a whole, had little, if any, likelihood of changing the jury's ultimate conclusion regarding the weight of the aggravating and mitigating circumstances. … The question before this court is not what effect the cumulative error generally might be expected to have upon a reasonable jury but, rather, what effect it had upon the actual sentencing determination in the case on review.

State v. Cheever, 304 Kan. 866, Syl. ¶ 30, 375 P.3d 979 (2016).

The errors alleged in this case include errors that infringed on Mr. Cross' rights under the Eighth Amendment to the United States Constitution, as well as the Sixth and Fourteenth Amendments to the United States Constitution, so the constitutional harmless error standard for cumulative error in the penalty phase applies, this Court must be able to

say, beyond a reasonable doubt, that the cumulative error had little if any likelihood of changing the jury's ultimate decision. 304 Kan. 866, Syl. ¶ 29.

The United States Supreme Court has held that "in capital cases the fundamental respect for humanity under the Eighth Amendment … requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 480, 304, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976). "Death, in its finality, differs more from life imprisonment than a 100–year prison term differs from one of only a year or two. Because of that qualitative difference, **there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case**." 428 U.S. 305 (emphasis added).

There were a series of errors in this case which led to a constitutionally inadequate penalty phase that provided no guarantee that death was, in fact, the appropriate punishment in this case: (1) the trial court's determination that Mr. Cross had a right to self-representation in the penalty phase; (2) the trial court's failure to insure that Mr. Cross made a knowing and voluntary waiver of his right to counsel during the penalty phase; (3) the trial court's failure to direct stand-by counsel to investigate and present a complete case in mitigation; and (4) the trial court's failure to *sua sponte* determine if Mr. Cross had the competency to represent himself in a capital case.

The cumulative effect of these errors left the investigation and presentation of a mitigation case solely in Mr. Cross' hands, a task that it was impossible for him to

perform. Further, the record shows that he was not informed of the purpose of a mitigation case, the nature of a mitigation case, or the indispensable role played by counsel and the mitigation team when he waived his right to counsel. Mr. Cross' mitigation case did nothing to place his offenses into the context of his life and character as a whole, leaving the jury with a completely one-sided view.

The United States Supreme Court has emphasized the importance of informing the sentencing jury of good aspects of the defendant's character, *Skipper v. South Carolina*, 476 U.S. 1, 5, 90 L.Ed.2d 1, 106 S.Ct. 1669 (1986)(evidence regarding a defendant's good character traits may not be excluded from the sentencer's consideration); the defendant's life history, including the painful aspects, *Williams v. Taylor*, 529 U.S. 362, 398, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000)("the graphic description of Williams' childhood, filled with abuse and privation …might well have influenced the jury's appraisal of his moral culpability."); and evidence of impaired intellectual functioning, *Tennard v. Dretke*, 542 U.S. 274, 288, 159 L. Ed. 2d 384, 124 S. Ct. 2562 (2004)("Evidence of significantly impaired intellectual functioning is obviously evidence that 'might serve as a basis for a sentence less than death.'"). Kansas law includes extreme emotional or mental disturbance as mitigating circumstances. See, K.S.A. 21-6625(2) and (6).

However, Mr. Cross' jury remained ignorant of his background and childhood. The jury's only knowledge of his father was that he was "Jew-wise." The jury learned nothing about any social or learning difficulties he may have had in school, his relationship with his parents or siblings, when or how any of them died. The jury learned

nothing about any childhood illnesses or accidents that may have impaired his intellectual or emotional well-being. The jury learned nothing about any substance abuse or mental illness in Mr. Cross' family, the jury learned nothing about whether he had been subjected to abuse or neglect. The jury learned nothing about Mr. Cross' service in Vietnam, whether he performed bravely, whether he was a witness to atrocities, whether he lost dear friends in combat or how his tours in Vietnam may have impacted him later in life. The jury learned that more than one of his children pre-deceased him, but learned nothing about the circumstances of those deaths, or the impact of those deaths on him.

While Mr. Cross would have substantial difficulty presenting, on his own, the jury with a full picture of his life and character, it was absolutely impossible for him to give the jury full information regarding his mental and emotional functioning. Mr. Cross' advanced age suggests that dementia could have played a role in both his extreme views and his decision to act on those views, but Mr. Cross could not screen himself for dementia or obtain testing and expert testimony. Previous brain injuries could have affected his views and actions, but Mr. Cross could not screen himself for brain injuries or impaired brain function. Mr. Cross' testimony suggested paranoid delusions that may have been the symptoms of mental illness, but he could not screen himself for possible mental illness or obtain testing or expert testimony.

All of these unexplored subjects have the potential to influence the weighing process undertaken by a life-qualified jury. But because Mr. Cross was denied the services of a jury consultant, this Court cannot be certain that jurors who would automatically vote for the death penalty did not serve on this jury.

The trial court's error in allowing Mr. Cross to represent himself resulted in his inevitable failure to investigate and then present the jury with an adequate case in mitigation. Mr. Cross did manage to gather and proffer evidence regarding his offers to plead guilty, but that too was erroneously kept from the jury. And although the record was replete with evidence suggesting that Mr. Cross suffered from a mental or emotional illness that may have impaired his ability to conform his conduct to the requirements of the law, the court wrongfully refused to instruct the jury on that mitigating circumstance. And while these mitigating circumstances were wrongfully excluded from the jurors' consideration, those jurors were improperly told to weigh the fact that this was a hate crime, Mr. Cross' demeanor at trial and Reat Underwood's age in aggravation, along with any other conduct that they considered to be heinous.

The question for this Court is whether it can say, beyond a reasonable doubt, that the jury's decision to impose death would have been the same if the jury had been life-qualified and if the jury had access to a constitutionally adequate mitigation case, if proper mitigating circumstances had not been kept from the jurors' consideration and if the jury had not been allowed to consider improper aggravating circumstances. Trial error in this case left the task of investigating and presenting a case in mitigation to an elderly, impoverished, incarcerated defendant, who may have been suffering from a mental illness, and who had no understanding of the purpose or nature of mitigation. As a result, neither the jury nor this Court knows what it does not know. In those circumstances, this Court cannot say, beyond a reasonable doubt that the jury's decision to impose death

would have been the same in the absence of the enumerated errors. Mr. Cross' sentence of death must be reversed.

Conclusion

For the foregoing reasons, Glenn Cross requests this Court reverse his convictions and the sentences imposed in this case.

Respectfully Submitted,

/s/ Reid T. Nelson
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Appellant's Brief was served by electronic mail, this 27th day of June, 2017, on

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Appendix A

American Bar Assn. Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty cases, 31 Hofstra L. Rev 913 (2003)

Setting forth elections from the ABA Standards, relevant to Issues 1 to 4: Defense counsel's heightened duties in capital cases, especially in the penalty phase.

5.1: Qualifications of Defense Counsel.

8.1: Training: relevant law, motions practice, jury selection, use of experts, preserving issues.

10.4: Defense team: mitigation specialist, investigator, and one member qualified to screen for mental or psychological disorders.

10.7: Investigation: The commentary outlines the "generally unparalleled investigation" into personal and family history.

10.8: Duty to assert all legal claims.

10.10.2: Voir dire. Must be familiar with procedures surrounding "death qualification" and "exposing those prospective jurors who would automatically impose the death penalty", or who are unable to give meaningful consideration to mitigating evidence."

10.11: Defense case concerning penalty. Outlining requirements for exhaustive investigation. Commentary states that mitigation need not be limited to factors that led to the crime, but includes impact of execution on client's family, positive contributions to community, and complete social history "from before conception to the present."

GUIDELINE 5.1—QUALIFICATIONS OF DEFENSE COUNSEL

A. **The Responsible Agency should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.**

B. **In formulating qualification standards, the Responsible Agency should insure:**

1. **That every attorney representing a capital defendant has:**

   a. **obtained a license or permission to practice in the jurisdiction;**

   b. **demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and**

   c. **satisfied the training requirements set forth in Guideline 8.1.**

2. **That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:**

   a. **substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;**

b. skill in the management and conduct of complex negotiations and litigation;

c. skill in legal research, analysis, and the drafting of litigation documents;

d. skill in oral advocacy;

e. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

f. skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

g. skill in the investigation, preparation, and presentation of mitigating evidence; and

h. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

History of Guideline

This Guideline has been substantially reorganized for this edition. In the original edition, it emphasized quantitative measures of attorney experience—such as years of litigation experience and number of jury trials—as the basis for qualifying counsel to undertake representation in death penalty cases. In this revised edition, the inquiry focuses on counsel's ability to provide high quality legal representation.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.2 (3d ed. 1992) ("Eligibility to Serve").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.15 (1973) ("Providing Assigned Counsel").

GUIDELINE 8.1—TRAINING

A. **The Legal Representation Plan should provide funds for the effective training, professional development, and continuing education of all members of the defense team.**

B. **Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the Responsible Agency, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:**

1. **relevant state, federal, and international law;**
2. **pleading and motion practice;**
3. **pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;**
4. **jury selection;**
5. **trial preparation and presentation, including the use of experts;**
6. **ethical considerations particular to capital defense representation;**
7. **preservation of the record and of issues for post-conviction review;**
8. **counsel's relationship with the client and his family;**
9. **post-conviction litigation in state and federal courts;**
10. **the presentation and rebuttal of scientific**

evidence, and developments in mental health fields and other relevant areas of forensic and biological science;

11. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.

C. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the Responsible Agency that focuses on the defense of death penalty cases.

D. The Legal Representation Plan should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.

History of Guideline

The importance of training was addressed in Guideline 9.1 of the original version of the Guidelines for lawyers seeking to receive appointments in capital cases. Subsections A and D have been added to this revised edition to emphasize that the Legal Representation Plan must provide for specialized training of all members of the defense team involved in the representation of capital defendants. Subsections B and C are based on the original edition of the Guideline. This revised edition of the Guideline has been amended to emphasize that qualified training programs must be "comprehensive" in scope. Thus the eleven areas of training set forth in Subsection B are new and are intended to indicate the broad range of topics that must be covered in order for an initial training program to meet minimum requirements. The requirement of participation in a continuing legal education program every two years is also a minimum; many capital defense counsel have discovered that they must attend training programs more frequently in order to provide effective legal representation.

GUIDELINE 10.4—THE DEFENSE TEAM

A. **When it is responsible for designating counsel to defend a capital case, the Responsible Agency should designate a lead counsel and one or more associate counsel. The Responsible Agency should ordinarily solicit the views of lead counsel before designating associate counsel.**

B. **Lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with these Guidelines and professional standards.**

1. **Subject to the foregoing, lead counsel may delegate to other members of the defense team duties imposed by these Guidelines, unless:**

   a. **The Guideline specifically imposes the duty on "lead counsel," or**

   b. **The Guideline specifically imposes the duty on "all counsel" or "all members of the defense team."**

C. **As soon as possible after designation, lead counsel should assemble a defense team by:**

1. **Consulting with the Responsible Agency regarding the number and identity of the associate counsel;**

2. **Subject to standards of the Responsible Agency that are in accord with these Guidelines and in consultation with associate counsel to the extent practicable, selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes:**

a. at least one mitigation specialist and one fact investigator;

b. at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and

c. any other members needed to provide high quality legal representation.

D. Counsel at all stages should demand on behalf of the client all resources necessary to provide high quality legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for further review.

History of Guideline

This Guideline is new. It supplements Guideline 4.1.

Related Standards

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-1.1 (1986) ("Roles of Mental Health and Mental Retardation Professionals in the Criminal Process").

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-5.7 (1986) ("Evaluation and Adjudication of Competence to Be Executed; Stay of Execution; Restoration of Competence").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-2.4 ("Special Assistants, Investigative Resources, Experts") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.1 ("Duty to Investigate") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

GUIDELINE 10.7—INVESTIGATION

A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.

1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.

2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

B. 1. Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.

2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

History of Guideline

This Guideline is based on portions of Guideline 11.4.1 of the original edition. Changes in this Guideline clarify that counsel should conduct thorough and independent investigations relating to both guilt and penalty issues regardless of overwhelming evidence of guilt, client statements concerning the facts of the alleged crime, or client statements

that counsel should refrain from collecting or presenting evidence bearing upon guilt or penalty.

Subsection B(1) is new and describes the obligation of counsel at every stage to examine the defense provided to the client at all prior phases of the case. Subsection B(2) is also new and describes counsel's ongoing obligation to ensure that the official record of proceedings is complete.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.1 ("Duty to Investigate"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 4.1 (1995) ("Investigation").

Commentary

At every stage of the proceedings, counsel has a duty to investigate the case thoroughly.[195] This duty is intensified (as are many duties) by the unique nature of the death penalty, has been emphasized by recent statutory changes,[196] and is broadened by the bifurcation of capital trials.[197] This Guideline outlines the scope of the investigation required by a capital case, but is not intended to be exhaustive.

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195. *See* Powell v. Alabama, 287 U.S. 45, 57 (1932) (describing "thorough-going investigation" as "vitally important"); ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.1, 4-6.1, *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993); NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 4.1 (1997) ("Investigation"); *see also* HERTZ & LEIBMAN, *supra* note 28 at 489 n.41 (discussing duty described in Subsection (B) to conduct full investigation of prior proceedings); *infra* text and accompanying note 240 (same); *infra* note 351 (discussing duty of post-conviction counsel to investigate all potential claims, whether or not previously asserted).

196. *See* 28 U.S.C. § 2254(e)(2) (2000), which, as amended by the AEDPA, precludes certain claims from federal habeas corpus review if the petitioner "has failed to develop the factual basis" of them "in State court proceedings." *See* Williams v. Taylor, 529 U.S. 420, 424 (2000) (construing this section).

197. *See generally* Lyon, *supra* note 3; Vick, *supra* note 4. Numerous courts have found counsel to be ineffective when they have failed to conduct an adequate investigation for sentencing. *See, e.g.*, Wiggins v. Smith, 123 S. Ct. 2543-44 (2003) (counsel ineffective because, although they obtained some mitigation evidence, they failed to investigate client's social history or explore the

Guilt/Innocence

As noted *supra* in the text accompanying notes 48-51, between 1976 and 2003 some 110 people were freed from death row in the United States on the grounds of innocence.[198] Unfortunately, inadequate investigation by defense attorneys—as well as faulty eyewitness identification, coerced confessions, prosecutorial misconduct, false jailhouse informant testimony,[199] flawed or false forensic evidence,[200] and the special vulnerability of juvenile suspects—have contributed to wrongful convictions in both capital and non-capital cases.[201] In capital cases, the mental vulnerabilities of a large portion of the client

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numerous areas of mitigation listed in first edition of these guidelines); Williams v. Taylor, 529 U.S. 362, 395-96 (2000) (counsel ineffective for failing to uncover and present evidence of defendant's "nightmarish childhood," borderline mental retardation, and good conduct in prison); Douglas v. Woodford, 316 F.3d 1079, 1087-89 (9th Cir. 2003) (although counsel did uncover and present some mitigating evidence, his investigation "was constitutionally inadequate" for failing to dig deeply enough into client's social, medical, and psychological background; nor did counsel adequately prepare the penalty phase witnesses in order to present the material that he did have "to the jury in a sufficiently detailed and sympathetic manner"); Brownlee v. Haley, 306 F.3d 1043, 1070 (11th Cir. 2002) (counsel ineffective for failing to "investigate, obtain, or present *any* mitigating evidence to the jury, let alone the powerful mitigating evidence of Brownlee's borderline mental retardation, psychiatric disorders, and history of drug and alcohol abuse"); *infra* note 205.

As discussed *infra* note 261, another consequence of bifurcation is that counsel must investigate the possibility that the defendant was judged at either the guilt or penalty phases by one or more jurors who were not impartial.

198. *See* DEATH PENALTY INFORMATION CENTER, *Innocence and the Death Penalty* (2003), *at* http://www.deathpenaltyinfo.org/article.php?did=412&scid=6 (stating that, "[s]ince 1973, 111 people in 25 states have been released from death row with evidence of their innocence") (latest release July 28, 2003); *see generally infra* note 231 (suggesting legal implications of these developments).

199. *See, e.g.*, Dodd v. State, 993 P.2d 778, 783-84 (Okla. Crim. App. 2000) (canvassing special unreliability of such testimony and restricting its use); *supra* note 50.

200. Recent years have seen a series of scandals involving the prosecution's use, knowingly or unknowingly, of scientifically unsupportable or simply fabricated forensic evidence by governmental agents. *See generally* U.S. DEP'T JUSTICE, OFF. INSP. GEN., THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES (1996) (detailing results of eighteen-month investigation into charges by whistleblower Frederic Whitehurst that FBI Laboratory mishandled "some of the most significant prosecutions in the recent history of the Department of Justice" and finding "significant instances of testimonial errors, substandard analytical work, and deficient practices"); Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439, 442-69 (1997) (summarizing numerous cases); *supra* note 51.

201. *See generally* BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2001).

population compound the possibilities for error.[202] This underscores the importance of defense counsel's duty to take seriously the possibility of the client's innocence,[203] to scrutinize carefully the quality of the state's case, and to investigate and re-investigate all possible defenses.[204]

In this regard, the elements of an appropriate investigation include the following:

1. Charging Documents:

   Copies of all charging documents in the case should be obtained and examined in the context of the applicable law to identify:

   a. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

   b. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;

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202. *See* Atkins v. Virginia, 536 U.S. 304, 320-21 (2002) ("Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."); *see also* Jurek v. Estelle, 623 F.2d 929, 938, 941 (5th Cir. 1980) (reviewing "with that suspicion mandated by the Supreme Court" the voluntariness of a confession made by a defendant of "limited intelligence"); Freedman, *supra* note 52, at 1104-06 (noting characteristics of mentally retarded persons making them more likely to confess falsely).

203. As this Guideline emphasizes, that is so even where circumstances appear overwhelmingly indicative of guilt. A recent study that includes both capital and non-capital DNA exonerations has found that in twenty-two percent of the cases the client had confessed notwithstanding his innocence. *See* SCHECK ET AL., *supra* note 201, at 120. *See* Dan Morain, *Blind Justice John Cherry's Killing Left Many Victims; Was the Accused One of Them?*, L.A. TIMES, July 16, 1989, View, at 6 (noting that Jerry Bigelow confessed many times, including to the media, and was eventually found to be innocent).

204. *See* Henderson v. Sargent, 926 F.2d 706, 711-12 (8th Cir. 1991) (granting writ where trial counsel's performance at guilt phase was ineffective in lacking "an adequate investigation of the facts of the case, consideration of viable theories, and development of evidence to support those theories," and state post-conviction counsel was ineffective for failing to perform full analysis of "trial testimony and the police record [and failing to conduct] interviews with the persons who testified at trial or had firsthand knowledge of the events surrounding the murder"); People v. Johnson, 609 N.E.2d 304, 310-12 (Ill. 1993) (holding state post-conviction counsel ineffective for failing to interview witnesses that client claimed trial attorneys should have called); Steven M. Pincus, *"It's Good to be Free" An Essay About the Exoneration of Albert Burrell*, 28 WM. MITCHELL L. REV. 27, 33-34 (2001).

c. any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) that can be raised to attack the charging documents; and

d. defense counsel's right to obtain information in the possession of the government, and the applicability, extent, and validity of any obligation that might arise to provide reciprocal discovery.

2. Potential Witnesses:

a. Barring exceptional circumstances, counsel should seek out and interview potential witnesses, including, but not limited to:

(1) eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself;

(2) potential alibi witnesses;

(3) witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), and the degree of culpability for the offense, including:

(a) members of the client's immediate and extended family
(b) neighbors, friends and acquaintances who knew the client or his family
(c) former teachers, clergy, employers, co-workers, social service providers, and doctors
(d) correctional, probation, or parole officers;

(4) members of the victim's family.

b. Counsel should conduct interviews of potential witnesses in the presence of a third person so that there is someone to call as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews. Counsel should investigate all sources of possible impeachment of defense and prosecution witnesses.

3. The Police and Prosecution:

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports, autopsy reports, photos, video or audio tape recordings, and crime scene and crime lab reports together with the underlying data therefor. Where necessary, counsel should pursue such efforts through formal and informal discovery.

4. Physical Evidence:

Counsel should make a prompt request to the relevant government agencies for any physical evidence or expert reports relevant to the offense or sentencing, as well as the underlying materials. With the assistance of appropriate experts, counsel should then aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence.

5. The Scene:

Counsel should view the scene of the alleged offense as soon as possible. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).

Penalty

Counsel's duty to investigate and present mitigating evidence is now well established.[205] The duty to investigate exists regardless of the expressed desires of a client.[206] Nor may counsel "sit idly by, thinking that investigation would be futile."[207] Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case.[208]

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205. *See, e.g.*, Wiggins v. Smith, 123 S. Ct. 2526 (2003) (counsel failed to uncover evidence that client never had a stable home and was repeatedly subjected to gross physical, sexual, and psychological abuse); Williams v. Taylor, 529 U.S. 362, 395-96 (2000) (counsel ineffective for failing to uncover and present evidence of defendant's "nightmarish childhood," borderline mental retardation, and good conduct in prison); Caro v. Woodford, 280 F.3d 1247, 1255 (9th Cir. 2002) (counsel ineffective for failing to investigate and present evidence of client's brain damage due to prolonged pesticide exposure and repeated head injuries, and failing to present expert testimony explaining "the effects of the severe physical, emotional, and psychological abuse to which Caro was subjected as a child"), *cert. denied*, 536 U.S. 951 (2002); Coleman v. Mitchell, 268 F.3d 417, 449-51 (6th Cir. 2001) (though counsel's duty to investigate mitigating evidence is well established, counsel failed to investigate and present evidence that defendant had been abandoned as an infant in a garbage can by his mentally ill mother, was raised in a brothel run by his grandmother where he was exposed to group sex, bestiality and pedophilia, and suffered from probable brain damage and borderline personality disorder), *cert. denied*, 535 U.S. 1031 (2002); Jermyn v. Horn, 266 F.3d 257, 307-08 (3d Cir. 2001) (counsel ineffective for failing to investigate and present evidence of defendant's abusive childhood and "psychiatric testimony explaining how Jermyn's development was thwarted by the torture and psychological abuse he suffered as a child"); *supra* note 197.

206. *See* Hardwick v. Crosby, 320 F.3d 1127, 1190 n.215 (11th Cir. 2003) ("Even if Hardwick did ask [counsel] not to present witnesses at the sentencing proceeding, . . . [counsel] had a duty to Hardwick at the sentencing phase to present available mitigating witnesses as Hardwick's defense against the death penalty."); Blanco v. Singletary, 943 F.2d 1477, 1501-03 (11th Cir. 1991) (counsel ineffective for "latch[ing] onto" client's assertions he did not want to call penalty phase witnesses and failing to conduct an investigation sufficient to allow their client to make an informed decision to waive mitigation); *see also* Karis v. Calderon, 283 F.3d 1117, 1136-41 (9th Cir. 2002), *cert. denied*, 126 S. Ct. 2637 (2003).

207. Voyles v. Watkins, 489 F. Supp. 901, 910 (N.D. Miss. 1980); *accord* Austin v. Bell, 126 F.3d 843, 849 (6th Cir. 1997) (counsel's failure to investigate and present mitigating evidence at the penalty phase of the trial "because he did not think that it would do any good" constituted ineffective assistance).

208. *See, e.g.*, Wiggins, 123 S. Ct. at 2526 (2003) (counsel's ineffectiveness lay not in failure to present evidence of client's family background, but rather in failure to conduct an investigation sufficient to support a professionally reasonable decision whether to do so); Douglas v. Woodford, 316 F.3d 1079, 1089 (9th Cir. 2003) ("It is, of course, difficult for an attorney to advise a client of the prospects of success or the potential consequences of failing to present mitigating evidence when the attorney does not know that such evidence exists."); Silva v. Woodford, 279 F.3d 825, 838-39 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 342 (2002); *Coleman*, 268 F.3d at 447; Battenfield v. Gibson, 236 F.3d 1215, 1229 (10th Cir. 2001) ("In addition to hampering [defense counsel's] ability to make strategic decisions, [defense counsel's] failure to investigate [defendant's background] clearly affected his ability to competently advise [defendant] regarding the meaning of

Because the sentencer in a capital case must consider in mitigation, "anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant,"[209] "penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history."[210] At least in the case of the client, this begins with the moment of conception.[211] Counsel needs to explore:

> (1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);
>
> (2) Family and social history (including physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment, and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);

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mitigation evidence and the availability of possible mitigation strategies."); United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989) ("[C]ounsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made."); Knighton v. Maggio, 740 F.2d 1344, 1350 (5th Cir. 1984) (petitioner entitled to relief if record shows that counsel "could not make a valid strategic choice because he had made no investigation").

209. Brown v. State, 526 So. 2d 903, 908 (Fla. 1988) (citing Hitchcock v. Dugger, 481 U.S. 393, 394 (1987)); *see also* Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978); *infra* text accompanying note 277.

210. Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, THE CHAMPION, Jan./Feb. 1999, at 35; *see also* ABA CRIMINAL JUSTICE SECTION, *supra* note 86, at 63.

211. *See* Norton, *supra* note 182, at 2 (mitigation investigation must encompass client's "whole life"); EQUAL JUSTICE INITIATIVE OF ALA., ALABAMA CAPITAL DEFENSE TRIAL MANUAL ch. 12 (3d ed. 1997) [hereinafter ALABAMA CAPITAL DEFENSE TRIAL MANUAL]; Lyon, *supra* note 3, at 703 (observing that "mitigation begins with the onset of the [defendant's] life" because "[m]any [defendants'] problems start with things like fetal alcohol syndrome, head trauma at birth, or their mother's drug addiction during pregnancy"); Vick, *supra* note 4, at 363.

(3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;

(4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);

(5) Employment and training history (including skills and performance, and barriers to employability);

(6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services);

The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations.[212]

Accordingly, immediately upon counsel's entry into the case appropriate member(s) of the defense team should meet with the client to:

1. discuss the alleged offense or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights;

2. explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors; and

212. *See supra* text accompanying notes 13-27.

3. obtain necessary releases for securing confidential records relating to any of the relevant histories.

Counsel should bear in mind that much of the information that must be elicited for the sentencing phase investigation is very personal and may be extremely difficult for the client to discuss. Topics like childhood sexual abuse should therefore not be broached in an initial interview. Obtaining such information typically requires overcoming considerable barriers, such as shame, denial, and repression, as well as other mental or emotional impairments from which the client may suffer. As noted *supra* in the text accompanying note 103, a mitigation specialist who is trained to recognize and overcome these barriers, and who has the skills to help the client cope with the emotional impact of such painful disclosures, is invaluable in conducting this aspect of the investigation.

It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers, and others.[213] Records—from courts, government agencies, the military, employers, etc.—can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness,[214] and corroborating witnesses' recollections. Records should be requested

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213. *See* Goodpaster, *supra* note 3, at 321; Lyon, *supra* note 3, at 704-06; Vick, *supra* note 4, at 366-67.

214. *See* Wiggins v. Smith, 123 S. Ct. 2527 (2003) (inadequacy of trial counsel's mitigation investigation demonstrated by post-conviction presentation of expert's report that demonstrated "the severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents" through "state social services, medical, and school records, as well as interviews with petitioner and numerous family members"); Williams v. Taylor, 529 U.S. 362, 395 (2000) (counsel ineffective where they:

> failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.)

(footnote omitted); Jermyn v. Horn, 266 F.3d 257, 307 (3d Cir. 2001) (counsel ineffective for failing to obtain school records that disclosed childhood abuse); *see also* ALABAMA CAPITAL DEFENSE TRIAL MANUAL, *supra* note 211; TEXAS DEATH PENALTY MITIGATION MANUAL, *supra* note 105, ch. 3; Norton, *supra* note 182, at 32-38.

concerning not only the client, but also his parents, grandparents, siblings, cousins, and children.[215] A multi-generational investigation extending as far as possible vertically and horizontally frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment.[216] The collection of corroborating information from multiple sources—a time-consuming task—is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence.[217]

Counsel should use all appropriate avenues including signed releases, subpoenas, court orders, and requests or litigation pursuant to applicable open records statutes, to obtain all potentially relevant information pertaining to the client, his or her siblings and parents, and other family members, including but not limited to:

a. school records
b. social service and welfare records
c. juvenile dependency or family court records
d. medical records
e. military records
f. employment records
g. criminal and correctional records
h. family birth, marriage, and death records
i. alcohol and drug abuse assessment or treatment records
j. INS records

If the client was incarcerated, institutionalized or placed outside of the home, as either a juvenile or an adult, the defense team should investigate the possible effect of the facility's conditions on the client's

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215. In order to verify or corroborate witness testimony about circumstances and events in the defendant's life, defense counsel must "assemble the documentary record of the defendant's life, collecting school, work, and prison records" which might serve as sources of relevant facts. Vick, *supra* note 4, at 367; *see also* Lyon, *supra* note 3, at 705-06. Contemporaneous records are more credible than witnesses sharing previously undisclosed memories or experts offering opinions that were formed only after the client faced capital charges. Records may also document events that neither the client nor family members remember. *See, e.g.*, *Williams*, 362 U.S. at 395 n.19 (relying on a social worker's graphic description of the Williams home that could not have been provided by client, who was too young, or the adult family members, who were too intoxicated, to recall the scene).

216. *See* Norton, *supra* note 182, at 3 (counsel should "investigate at least three generations" of the client's family).

217. *See id.* (advocating "triangulation" of data).

contemporaneous and later conduct.[218] The investigation should also explore the adequacy of institutional responses to childhood trauma, mental illness, or disability to determine whether the client's problems were ever accurately identified or properly addressed.[219] Even if the institution that responded to the client was not grossly abusive or neglectful, it may have been incompetent in a number of ways. For example, IQ testing or other psychological evaluations may have been performed by untrained personnel or using inappropriate instruments—flaws that might not appear on the face of the institutional records.

The circumstances of a particular case will often require specialized research and expert consultation. For example, if a client grew up in a migrant farm worker community, counsel should investigate what pesticides the client may have been exposed to and their possible effect on a child's developing brain.[220] If a client is a relatively recent immigrant, counsel must learn about the client's culture, about the circumstances of his upbringing in his country of origin, and about the difficulties the client's immigrant community faces in this country.[221] Counsel should also be particularly sensitive in these circumstances to language or translation difficulties that may unwittingly have led to misunderstandings between the client and others, including government officials and members of the community at large, with whom he may have come into contact.

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218. *See* TERRY A. KUPERS, M.D., PRISON MADNESS THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT, 33-34 (1999); David M. Halbfinger, *Care of Juvenile Offenders in Mississippi is Faulted*, N.Y. TIMES, Sept. 1, 2003 at A13 (describing allegations of severely abusive conditions in Mississippi juvenile detention facilities and noting that "what is happening in Mississippi is by no means rare. Arizona, Arkansas, California, Georgia, Louisiana, Maryland, and South Dakota, among other states, have all had scandals in recent years," although the conditions in Mississippi were supposed to have been corrected pursuant to a court order issued in 1977).

219. *See* Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1467 (1997) (noting damaging effects of "social conditions and experiences" often inflicted on institutionalized juvenile offenders).

220. *See* Caro v. Woodford, 280 F.3d 1247, 1255 (9th Cir. 2002), *cert. denied*, 536 U.S. 951 (2002).

221. *See* Mak v. Blodgett, 970 F.2d 614, 616-18 & n.5 (9th Cir. 1992) (positive testimony from defendant's family, combined with expert testimony about difficulty of adolescent immigrants from Hong Kong assimilating to North America, would have humanized client and could have resulted in a life sentence for defendant convicted of thirteen murders). *See also* Guideline 10.6 and accompanying commentary (noting that foreign government might recognize an American citizen as one of its nationals and provide counsel with extremely valuable assistance).

Miscellaneous Concerns

Counsel should maintain copies of media reports about the case for various purposes, including to support a motion for change of venue, if appropriate, to assist in the voir dire of the jury regarding the effects of pretrial publicity, to monitor the public statements of potential witnesses, and to facilitate the work of counsel who might be involved in later stages of the case.

Counsel must also investigate prior convictions, adjudications, or unadjudicated offenses that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside.[222] Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction, adjudication, or unadjudicated offense.[223]

Additional investigation may be required to provide evidentiary support for other legal issues in the case, such as challenging racial discrimination in the imposition of the death penalty or in the composition of juries.[224] Whether within the criminal case or outside it, counsel has a duty to pursue appropriate remedies if the investigation reveals that such conditions exist.[225]

As discussed *infra* in the text accompanying notes 249-52, counsel should consider making overtures to members of the victim's family—possibly through an intermediary, such as a clergy member, defense-victim liaison, or representative of an organization such as Murder Victim's Families for Reconciliation—to ascertain their feelings about the death penalty and/or the possibility of a plea.[226]

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222. *See* Johnson v. Mississippi, 486 U.S. 578, 586-87 (1988); *supra* notes 7, 22.

223. *See supra* text accompanying notes 20-28.

224. *See, e.g.*, Miller-el v. Cockrell, 537 U.S. 322, 329-33 (2003) (ruling for habeas petitioner in reliance on evidence regarding prosecutors' racial discrimination during voir dire presented at a pre-trial hearing and in state post-conviction proceedings); Sara Rimer, *In Dallas, Dismissal of Black Jurors Leads to Appeal by Death Row Inmate*, N.Y. TIMES, Feb. 13, 2002, at A24 (discussing memoranda and training manuals from prosecutor's office documenting policy of racial discrimination in jury selection); Stephen B. Bright, *Challenging Racial Discrimination in Capital Cases*, THE CHAMPION, Jan./Feb. 1997, at 22.

225. *See infra* Guideline 10.10.2; *supra* text accompanying note 7; *infra* text accompanying notes 264-70.

226. *See* Russell Stetler, *Working with the Victim's Survivors in Death Penalty Cases*, THE CHAMPION, June 1999, at 42; *see also* Michael Janofsky, *Parents of Gay Obtain Mercy for His Killer*, N.Y. TIMES, Nov. 5, 1999, at A1 (describing widely publicized case in which the prosecutor decided to drop his request for the death penalty because the parents of the victim so requested).

GUIDELINE 10.8—THE DUTY TO ASSERT LEGAL CLAIMS

A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should:

1. consider all legal claims potentially available; and

2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and

3. evaluate each potential claim in light of:

a. the unique characteristics of death penalty law and practice; and

b. the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence; and

c. the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and

d. any other professionally appropriate costs and benefits to the assertion of the claim.

B. Counsel who decide to assert a particular legal claim should:

1. present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and

2. ensure that a full record is made of all legal proceedings in connection with the claim.

C. Counsel at all stages of the case should keep under consideration the possible advantages to the client of:

1. asserting legal claims whose basis has only recently become known or available to counsel; and

2. supplementing claims previously made with additional factual or legal information.

History of Guideline

This Guideline is based on Guideline 11.5.1 ("The Decision to File Pretrial Motions") and Guideline 11.7.3 ("Objection to Error and Preservation of Issues for Post Judgment Review") of the original edition. New language makes clear that the obligations imposed by this Guideline exist at every stage of the proceeding and extend to procedural vehicles other than the submission of motions to the trial court.

In Subsection A(3)(b), the phrase "near certainty" is new and replaces the word "likelihood" from the original edition. The change reflects recent scholarship indicating that appellate and post-conviction remedies are pursued by almost 100% of capital defendants who are convicted and sentenced to death.

Subsections B and C are new to this edition.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-3.6 ("Prompt Action to Protect the Accused"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.5 ("Compliance with Discovery Procedure"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

GUIDELINE 10.10.2—VOIR DIRE AND JURY SELECTION

A. Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case (particularly those relating to bias on the basis of race or gender), whether any procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge. Such challenges may include challenges to the selection of the grand jury and grand jury forepersons as well as to the selection of the petit jury venire.

B. Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

C. Counsel should consider seeking expert assistance in the jury selection process.

History of Guideline

This Guideline is based on Guideline 11.7.2 of the original edition. Subsection A of the Guideline has been amended to make clear that potential jury composition challenges should not be limited to the petit jury, but should also include the selection of the grand jury and grand

GUIDELINE 10.11—THE DEFENSE CASE CONCERNING PENALTY

A. **As set out in Guideline 10.7(A), counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation.**

B. **Trial counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between the strategy for the sentencing phase and for the guilt/innocence phase.**

C. **Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.**

D. **Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body or individual, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation.**

E. **Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.**

F. **In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:**

1. **Witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that would be**

explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death;

2. **Expert and lay witnesses along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;**

3. **Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;**

4. **Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.**

5. **Demonstrative evidence, such as photos, videos, and physical objects (e.g., trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.**

G. **In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise**

inadmissible aggravating evidence. Counsel should pursue all appropriate means (e.g., motions in limine) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration, and should make a full record in order to support any subsequent challenges.

H. Trial counsel should determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof. If the jurisdiction has rules regarding notification of these factors, counsel at all stages of the case should object to any non-compliance, and if such rules are inadequate, counsel at all stages of the case should challenge the adequacy of the rules.

I. Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible.

J. If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should:

1. carefully consider

a. what legal challenges may appropriately be made to the interview or the conditions surrounding it, and

b. the legal and strategic issues implicated by the client's co-operation or non-cooperation;

2. insure that the client understands the significance of any statements made during such an interview; and

3. attend the interview.

K. Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.

L. Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.

History of Guideline

The substance of this Guideline is drawn from Guideline 11.8.3 of the original edition. The principal changes are the expansion of coverage to counsel at all stages of the proceedings, and language changes to underscore the range and importance of expert testimony in capital cases, the breadth of mitigating evidence, and counsel's duty to present arguments in mitigation.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-8.1 ("Sentencing"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.1 (1995) ("Obligations of Counsel in Sentencing").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.2 (1995) ("Sentencing Options, Consequences and Procedures").

Commentary

Capital sentencing is unique in a variety of ways, but only one ultimately matters: the stakes are life and death.

This commentary is written primarily from the perspective of trial counsel. But corresponding obligations rest on successor counsel. This Guideline has been broadened to include them because of the realities that in capital cases (a) more evidence tends to become available to the defense as time passes,[271] and (b) updated presentations of the defense case on penalty in accordance with Guideline 10.15.1(E)(3) may influence decisionmakers both on the bench (e.g., an appellate court considering a claim of ineffective assistance of counsel) and off it (e.g., the prosecutor, the Governor).

The Importance of an Integrated Defense

During the investigation of the case, counsel should begin to develop a theme that can be presented consistently through both the first and second phases of the trial. Ideally, "the theory of the trial must complement, support, and lay the groundwork for the theory of mitigation."[272] Consistency is crucial because, as discussed in the commentary to Guideline 10.10.1, counsel risks losing credibility by making an unconvincing argument in the first phase that the defendant did not commit the crime, then attempting to show in the penalty phase why the client committed the crime.[273] First phase defenses that seek to reduce the client's culpability for the crime (e.g., by negating intent) rather than to deny involvement altogether are more likely to be consistent with mitigating evidence of mental illness, retardation, domination by a co-defendant, substance abuse, or trauma.[274] But whether or not the guilt phase defense will be that the defendant did not

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271. *See supra* text accompanying note 39.

272. Lyon, *supra* note 3, at 711.

273. *See id.* at 708; Scott E. Sundby, *The Capital Jury and Absolution*, 38 CORNELL L. REV. 1557, 1596-97 (1998).

274. In fact, most statutory mitigating circumstances, which were typically adapted from the Model Penal Code, are "imperfect" versions of first phase defenses such as insanity, diminished capacity, duress, and self-defense. *See* Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 856-57 (1992) (reviewing BEVERLY LOWRY, CROSSED OVER: A MURDER, A MEMOIR (1992)). Of course, the defendant's penalty phase presentation may not constitutionally be limited to statutory mitigating circumstances and the jury must be allowed to give full consideration to any non-statutory ones he advances. *See* Hitchcock v. Dugger, 481 U.S. 393, 394 (1987); Lockett v. Ohio, 438 U.S. 586, 604 (1978).

commit the crime, counsel must be prepared from the outset to make the transition to the penalty phase.[275]

The Defense Presentation at the Penalty Phase

As discussed in the commentary to Guideline 10.7, areas of mitigation are extremely broad and encompass any evidence that tends to lessen the defendant's moral culpability for the offense or otherwise supports a sentence less than death.[276] Often, a mitigation presentation is offered not to justify or excuse the crime "but to help explain it."[277] If counsel cannot establish a direct cause and effect relationship between any one mitigating factor and the commission of a capital offense,

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275. For an example of an argument making an effective transition, see Edith Georgi Houlihan, *Defending the Accused Child Killer,* THE CHAMPION, Apr. 1998, at 23. Jurisdictions vary as to whether the defendant has a right to present lingering doubt as a mitigating circumstance. *Compare* People v. Sanchez, 906 P.2d 1129, 1178 (Cal. 1995) (stating that under California law, "the jury's consideration of residual doubt is proper"), *with* Way v. State, 760 So. 2d 903, 916-17 (Fla. 2000) (rejecting claim under Florida constitution that a defendant must be permitted to present mitigating "evidence relevant only to establish a lingering doubt"). Existing case law in the United States Supreme Court suggests that a capital defendant has no federal constitutional right to have lingering doubt considered as a mitigating circumstance at the penalty phase. *See* Franklin v. Lynaugh, 487 U.S. 164, 174 (1988). Given the significant number of death row exonerations, *see supra* text accompanying notes 48-51 & 198-204, and the degree to which these have plainly troubled many Justices, *see* Atkins v. Virginia, 536 U.S. 304, 320 n.25 (2002) ("Despite the heavy burden that the prosecution must shoulder in capital cases . . . in recent years a disturbing number of inmates on death row have been exonerated."), *supra* text accompanying note 31, there is ample reason to doubt the force of this precedent. *See* CONSTITUTION PROJECT, *supra* note 50, at 40-41 (advocating allowing lingering doubt to be considered as a mitigating circumstance); *see generally* Christina S. Pignatelli, *Residual Doubt: It's a Life Saver*, 13 CAP. DEF. J. 307 (2001).

276. *See* Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989) (stating that "it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense"); McCleskey v. Kemp, 481 U.S. 279, 306 (1987) (reaffirming that "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant"); Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986) (holding evidence of defendant's positive adaptation to prison is relevant and admissible mitigating evidence even though it does "not relate specifically to petitioner's culpability for the crime he committed"). Similarly, counsel could appropriately argue to the jury that the death sentence should not be imposed on a client because doing so would tend to incite the client's political followers to avenge him by committing further crimes. *See, e.g.*, Benjamin Weiser, *Jury Rejects Death Penalty for Terrorist*, N.Y. TIMES, July 11, 2001, at B1 (reporting successful use of this argument at trial of defendant convicted of bombing American embassy).

277. Haney, *supra* note 93, at 560. *See* Simmons v. Luebbers, 299 F.3d 929, 938-39 (8th Cir. 2002) ("Mitigating evidence was essential to provide some sort of explanation for Simmons's abhorrent behavior. Despite the availability of such evidence, however, none was presented. Simmons's attorneys' representation was ineffective."), *cert. denied* 123 S. Ct. 1582 (2003).

counsel may wish to show the combination of factors that led the client to commit the crime.[278] But mitigation evidence need not be so limited. Depending on the case, counsel may choose instead to emphasize the impact of an execution on the client's family, the client's prior positive contributions to the community, or other factors unconnected to the crime which militate against his execution (Subsection F). In any event, it is critically important to construct a persuasive narrative in support of the case for life, rather than to simply present a catalog of seemingly unrelated mitigating factors.[279]

Since an understanding of the client's extended, multi-generational history is often needed for an understanding of his functioning, construction of the narrative normally requires evidence that sets forth and explains the client's complete social history from before conception to the present. Expert witnesses may be useful for this purpose and may assist the jury in understanding the significance of the observations.[280] For example, expert testimony may explain the permanent neurological damage caused by fetal alcohol syndrome or childhood abuse, or the hereditary nature of mental illness, and the effects of these impairments on the client's judgment and impulse control.[281] Counsel should choose experts who are tailored specifically to the needs of the case, rather than relying on an "all-purpose" expert who may have insufficient knowledge or experience to testify persuasively.[282] In order to prepare effectively for trial, and to choose the best experts, counsel should take advantage of training materials and seminars and remain current on developments in fields such as neurology and psychology, which often have important implications for understanding clients' behavior.[283] Counsel should also

278. *See* Haney, *supra* note 93, at 600.

279. For an example of the process working as it should, see Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES MAG., July 6, 2003, at 32. *See generally* Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1140-41 (1997) (noting that jurors find expert testimony unpersuasive if it is not tied into other evidence presented in the case).

280. *See* White, *supra* note 3, at 342-43.

281. *See, e.g.*, Ainsworth v. Woodford, 268 F.3d 868, 876 (9th Cir. 2001) (stating that "the introduction of expert testimony would also have been important" to explain the effects that "'serious physical and psychological abuse and neglect as a child'" had on the defendant).

282. *See* Caro v. Calderon, 165 F.3d 1223, 1226-27 (9th Cir. 1999) (although counsel consulted four experts, including a medical doctor, a psychologist, and a psychiatrist, counsel failed to consult neurologist or toxicologist who could have explained neurological effects of defendant's extensive exposure to pesticides).

283. High quality continuing legal education programs on the death penalty, such as those noted *supra* in the commentary to Guideline 8.1, regularly present such information.

seek advice and assistance from colleagues and experts in the field of capital litigation.

Counsel should ordinarily use lay witnesses as much as possible to provide the factual foundation for the expert's conclusions.[284] Community members such as co-workers, prison guards, teachers, military personnel, or clergy who interacted with the defendant or his family, or have other relevant personal knowledge or experience often speak to the jury with particular credibility.[285]

Family members and friends can provide vivid first-hand accounts of the poverty and abuse that characterize the lives of many capital defendants. These witnesses can also humanize the client by allowing the jury to see him in the context of his family, showing that they care about him, and providing examples of his capacity to behave in a caring, positive way, such as attempting to protect other family members from domestic violence or trying to be a good parent and provider.[286] Similarly, acquaintances who can testify to the client's performance of good works in the community may help the decisionmaker to have a more complete view of him. None of this evidence should be offered as counterweight to the gravity of the crime, but rather to show that the person who committed the crime is a flawed but real individual rather than a generic evildoer, someone for whom one could reasonably see a constricted but worthwhile future.

In addition to humanizing the client, counsel should endeavor to show that the alternatives to the death penalty would be adequate punishment. Studies show that "future dangerousness is on the minds of most capital jurors, and is thus 'at issue' in virtually all capital trials," whether or not it is argued by the prosecution or is a statutorily mandated sentencing consideration.[287] Accordingly, counsel should give serious consideration to making an explicit presentation of information on this subject. Evidence that the client has adapted well to prison and has had few disciplinary problems can allay jurors' fears and reinforce other positive mitigating evidence.[288] Counsel should therefore always

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284. *See* Sundby, *supra* note 279, at 1163-84.

285. *See id.* at 1118, 1151.

286. *See id.* at 1152-62; *see also* Wayne A. Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials*, 33 U. MICH. J.L. REFORM 1, 12-14 (1999).

287. John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397, 398-99 (2001).

288. *See* Skipper v. South Carolina, 476 U.S. 1, 8 (1986) (stating that jury would "quite naturally" give great weight to "[t]he testimony of ... disinterested witnesses" such as "jailers who would have had no particular reason to be favorably predisposed toward one of their charges");

encourage the client not only to avoid any disciplinary infractions but also to participate in treatment programs and/or educational, religious or other constructive activities.

Counsel is entitled to impress upon the sentencer through evidence, argument, and/or instruction that the client will either never be eligible for parole, will be required to serve a lengthy minimum mandatory sentence before being considered for parole, or will be serving so many lengthy, consecutive sentences that he has no realistic hope of release.[289] In at least some jurisdictions, counsel may be allowed to present evidence concerning the conditions under which such a sentence would be served.[290]

Counsel should also consider, in consultation with the client, the possibility of the client expressing remorse for the crime in testimony, in allocution, or in a post-trial statement. If counsel decides that a trial presentation by the client is desirable, and the proposed testimony or allocution is forestalled by evidentiary rulings of the court either

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Sundby, *supra* note 279, at 1147 (noting tendency of juries to respond favorably to testimony of prison employees).

289. The Supreme Court has held that:

> where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant 'to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel.'

Shafer v. South Carolina, 532 U.S. 36, 39 (2001) (quoting Ramdass v. Angelone, 530 U.S. 156, 165 (2000) (plurality opinion)). The precise contours of this rule remain in dispute, *see* Brown v. Texas, 522 U.S. 940, 940-41 (1997), and counsel may appropriately seek to extend them (e.g., by applying the rule to other alternative sentences than life imprisonment without parole or by requiring that the jury receive the information through instructions).

Some state courts have held that the trial court must resolve, before the capital sentencing hearing, issues such as the length of other sentences the defendant would serve and whether he would be eligible for parole. *See* Clark v. Tansy, 882 P.2d 527, 534 (N.M. 1994) (holding that trial court must, upon defendant's request, impose sentence for non-capital convictions prior to jury deliberations on death penalty); Turner v. State, 573 So. 2d 657, 674-75 (Miss. 1990) (stating that trial court should determine defendant's habitual offender status before capital sentencing hearing so jury could be accurately informed of defendant's parole ineligibility). In other jurisdictions, the defense can at least argue that the defendant is *likely* to receive lengthy, consecutive sentences. *See* Jones v. State, 569 So. 2d 1234, 1239-40 (Fla. 1990) (finding length of time a defendant would be "removed from society" if sentenced to life imprisonment is relevant mitigating evidence that the jury must be permitted to consider); Turner v. State, 645 So. 2d 444, 448 (Fla. 1994) (holding that jury could properly consider in mitigation that alternative to death sentences would have been two life sentences with combined minimum mandatory of fifty years).

290. In the federal capital sentencing of a defendant convicted of bombing American embassies overseas, the defense presented evidence about conditions at the federal "Super Max" prison in Florence, Colorado, where the defendant would be incarcerated if sentenced to life without parole. *See* Benjamin Weiser, *Lawyers for Embassy Bomber Push for Prison Over Execution*, N.Y. TIMES, June 27, 2001, at B4; *see also infra* note 311. The defendant was subsequently sentenced to life without parole. *See* Weiser, *supra* note 276.

disallowing it or conditioning it on unacceptable cross-examination, counsel should take care to make a full record of the circumstances, including the content of the proposed statement. In light of the strong common law underpinnings of allocution and the broad constitutional right to present mitigation that has already been described, any such issue is likely to merit the careful examination of successor counsel.

Finally, in preparing a defense presentation on mitigation, counsel must try to anticipate the evidence that may be admitted in response and to tailor the presentation to avoid opening the door to damaging rebuttal evidence that would otherwise be inadmissible.[291]

The Defense Response to the Prosecution's Penalty Phase Presentation

Counsel should prepare for the prosecutor's case at the sentencing phase in much the same way as for the prosecutor's case at the guilt/innocence phase.[292] Counsel should use available discovery mechanisms to ascertain the aggravating and rebuttal evidence the prosecution intends to introduce, and then thoroughly investigate to determine whether this evidence can be excluded, rebutted, or undercut. As discussed in the commentary to Guideline 10.2, jurisdictions vary in whether the defense must be formally notified as to whether the prosecution will seek the death penalty. If required notice has not been given, counsel should also prepare to challenge at the sentencing phase any prosecution efforts that should be barred for failure to give notice.[293]

Counsel should carefully research applicable state and federal law governing the admissibility of evidence in aggravation. Where possible, counsel should move to exclude aggravating evidence as inadmissible, and, if that fails, rebut the evidence or offer mitigating evidence that will blunt its impact.[294]

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291. However, as Subsection G suggests, if there is uncertainty as to the scope of how wide this opening would be or if counsel believes that excessive rebuttal is to be admitted, they should object and make a full record on the issue.

292. *See* White, *supra* note 3, at 358.

293. *See supra* text accompanying notes 163-64.

294. *See* Smith v. Stewart, 189 F.3d 1004, 1010-11 (9th Cir. 1999) (concluding counsel was ineffective in part for failing to challenge the state's use of prior rape convictions in aggravation as prior violent offenses where both of the convictions occurred when Arizona law did not include violence as an element of rape); Parker v. Bowersox, 188 F.3d 923, 929-31 (8th Cir. 1999) (concluding trial counsel was ineffective for failing to present evidence to rebut the only aggravating circumstances); Summit v. Blackburn, 795 F.2d 1237, 1244-45 (5th Cir. 1986) (concluding trial counsel was ineffective for failing to argue the lack of corroborating evidence of the sole aggravating factor when under state law a defendant cannot be convicted based solely on an

If (but only if)[295] the defense presents an expert who has examined the client, a prosecution expert may be entitled to examine the client to prepare for rebuttal.[296] Counsel should become familiar with the governing law regarding limitations on the scope of expert evaluations conducted by prosecution experts, and file appropriate motions to ensure that the scope of the examination is no broader than legally permissible.[297] If the examination is not limited as counsel deem appropriate, Subsection J(1) requires them to give careful consideration to their response (e.g., refuse to participate on possible pain of preclusion, participate at the cost of an irretrievable surrender of information, seek relief from a higher court). Counsel must discuss with the client in advance any evaluation that is to take place and attend the examination in order to protect the client's rights (Subsections J(2)-(3)). Counsel may also seek to have the evaluation observed by a defense expert.

Counsel should integrate the defense response to the prosecution's evidence in aggravation with the overall theory of the case. In some cases, counsel's response to aggravating evidence at the penalty stage converges with the defense presentation at the guilt/innocence phase. The prosecutor will offer no additional evidence at the penalty phase but will simply rely on aggravating factors established by the evidence at the

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uncorroborated confession and the only evidence supporting the aggravating factor was defendant's confession).

295. *See, e.g.*, Estelle v. Smith, 451 U.S. 454, 468 (1981) (per curiam) (stating "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding").

296. As described *infra* in note 297, several states explicitly limit this right in various ways.

297. *See, e.g.*, FED. R. CRIM. P. 12.2(c)(4) (2003) ("No statement made by a defendant in the course of any [court-ordered psychiatric] examination . . . may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant . . . has introduced evidence"); Abernathy v. State, 462 S.E.2d 615, 616 (Ga. 1995) (holding that where defendant intends "to introduce evidence of mental illness in any phase of trial," he may be required "to submit to an independent psychiatric evaluation or be barred from presenting such evidence, even in mitigation"); State v. Reid, 981 S.W.2d 166, 168 (Tenn. 1998) (stating that once defendant files notice of intent to present expert testimony regarding mitigating evidence, state expert may examine defendant; however, state expert report will be provided only to the defense until after conviction and after defendant confirms intent to rely on expert testimony as part of case in mitigation); *see also* FLA. R. CRIM. P. 3.202(d) (2002) ("After the filing of [notice] . . . to seek the death penalty, the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant be examined by a mental health expert chosen by the state. . . . The examination shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony."); Dillbeck v. State, 643 So. 2d 1027, 1030-31 (Fla. 1994) ("[W]here the defendant plans to use only in the penalty phase the testimony of an expert who has interviewed him or her, the State is entitled to examine the defendant only after conviction and after the State has certified that it will seek the death penalty."); State v. Johnson, 576 S.E.2d 831, 835-37 (Ga. 2003).

guilt/innocence phase, such as that the murder was committed during the course of a felony.[298] In such cases, counsel's rebuttal presentation should focus on the circumstances of the crime, and defendant's conduct as it relates to the elements of the applicable aggravating circumstances.

In other cases, the prosecution will introduce additional aggravating evidence at the penalty stage. If the prosecutor seeks to introduce evidence of unadjudicated prior criminal conduct as aggravating evidence, counsel should fully investigate the circumstances of the prior conduct and determine whether it is properly admissible at the penalty stage.[299]

If the prosecution relies upon a prior conviction (as opposed to conduct), counsel should also determine whether it could be attacked as the product of an invalid guilty plea,[300] as obtained when the client was unrepresented by counsel,[301] as a violation of double jeopardy,[302] or on some other basis. Counsel should determine whether a constitutional challenge to a prior conviction must be litigated in the jurisdiction where the conviction occurred.[303]

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298. *See, e.g.*, Lowenfield v. Phelps, 484 U.S. 231, 246 (1988); *see also* FLA. STAT. ANN. § 921.141(5) (West 2001) (listing as an aggravating circumstance the fact that the crime was committed while the defendant was engaged in, or an accomplice to, the commission or attempted commission or flight after committing or attempting to commit any one of twelve enumerated felonies). In some states, the prosecution is essentially limited at the penalty phase to the evidence admitted at the guilt phase. *See, e.g.*, N.Y. CRIM. PROC. LAW § 400.27(3), (6) (McKinney 2002).

299. *See supra* text accompanying notes 23, 222-23. In some jurisdictions, only criminal conduct for which the client has been convicted is admissible at the penalty stage. *See, e.g.*, FLA. STAT. ANN. § 921.141(5) (listing as aggravating circumstance the fact that the defendant was previously convicted of capital felony or a felony involving violence). In others, no conviction is necessary, but the admissibility of a prior bad act may depend on other factors. *See, e.g.*, CAL. PENAL CODE § 190.3 (West 1999) (allowing admission of evidence of other criminal activity at penalty phase even though the defendant was not convicted for it, unless the defendant was prosecuted and acquitted or it did not involve the use or threat of violence); Pace v. State, 524 S.E.2d 490, 505 (Ga. 1999) (prior crime without conviction may be used in aggravation unless there is a previous acquittal). As a matter of constitutional law, the attack on the admission of unadjudicated prior misconduct in capital sentencing, which has long been a powerful one in light of the Court's established recognition of the need for special reliability in that context, *see* Monge v. California, 524 U.S. 721, 731-33 (1998) (collecting authority), has received additional support both from *Ring v. Arizona*, 536 U.S. 584 (2002) and from the Court's elaboration of due process limitations in related contexts. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1523 (2003) (in assessing punitive damages a recidivist may be punished more severely than a first offender, but only where the repeated misconduct is of the same sort as that involved in current case).

300. *See* Boykin v. Alabama, 395 U.S. 238, 242-44 (1969).

301. *See* Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

302. *See* Menna v. New York, 423 U.S. 61, 62 (1975).

303. *See* Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 402-04 (2001); *see also supra* note 22.

In jurisdictions where victim impact evidence is permitted, counsel, mindful that such evidence is often very persuasive to the sentencer, should ascertain what, if any, victim impact evidence the prosecution intends to introduce at penalty phase, and evaluate all available strategies for contesting the admissibility of such evidence[304] and minimizing its effect on the sentencer.[305]

In particular, in light of the instability of the case law,[306] counsel should consider the federal constitutionality of admitting such evidence to be an open field for legal advocacy.[307]

Counsel should also evaluate how to blunt certain intangible factors that can be damaging to a capital defendant at sentencing, including the heinous nature of the crime or the sentencer's possible racial antagonism for the client.[308] In jurisdictions where the alternative to a death sentence is life without the possibility of parole, counsel should consider informing the jury of the defendant's parole ineligibility in order to blunt the concern that the defendant may one day be released from custody.[309] If they have not done so previously in building their affirmative case for

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304. Limitations on the admission of such evidence exist in a number of jurisdictions as a matter of state law. *See, e.g.*, People v. Edwards, 819 P.2d 436, 464-67 (Cal. 1991); Bivins v. State, 642 N.E.2d 928, 956-57 (Ind. 1994).

305. *See generally* Jeremy A. Blumenthal, *The Admissibility of Victim Impact Statements at Capital Sentencing: Traditional and Nontraditional Perspectives*, 50 DRAKE L. REV. 67 (2001); Randall Coyne, *Inflicting* Payne *on Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital Cases*, 45 OKLA. L. REV. 589, 612-15 (1992); Ellen Kreitzberg, *How Much* Payne *Will the Courts Allow?*, THE CHAMPION, Jan./Feb. 1998, at 31; Michael Ogul, *Capital Cases: Dealing with Victim Impact Evidence* (pts. 1 & 2), THE CHAMPION, June 2000, at 43, Aug./Sept. 2000, at 42.

306. *Compare* Booth v. Maryland, 482 U.S. 496, 501-03 (1987) (victim impact evidence unconstitutional), *and* South Carolina v. Gathers, 490 U.S. 805, 810-12 (1989) (prosecutorial argument for death based upon laudable characteristics of victim unconstitutional), *with* Payne v. Tennessee, 501 U.S. 808, 825, 828-30 (1991) (overruling *Booth* and *Gathers* while noting that Due Process Clause is violated if such evidence is unduly prejudicial).

307. Of course, counsel should also pursue all available state law theories that might exclude such evidence, as indicated *supra* in note 232; *see, e.g.*, Olsen v. State, 2003 Wyo. LEXIS 57, 176-93 (April 14, 2003) (reviewing Wyoming statutory scheme and concluding it does not authorize admission of victim impact evidence in capital case); People v. Logan, 224 Ill. App.3d 735 (1st Dist. 1991) (notwithstanding that no death penalty had been imposed, it was ineffective assistance of appellate counsel to fail to challenge victim impact testimony as inadmissible under state law or limit its impact). For example, on the assumption that victim impact evidence in support of the death penalty would be admissible, there is conflicting case law in various states on whether the defense can call members of the victim's family to testify in opposition to the client's execution. *Cf. supra* text accompanying note 277 (noting that Constitution requires defendants to be able to offer any evidence that might cause sentencer to decline to impose a death sentence in the case at hand).

308. *See* White, *supra* note 3, at 359-60.

309. *See supra* text accompanying notes 289-90.

a penalty less than death,[310] counsel should also consider putting on evidence describing the conditions under which the client would serve a life sentence to rebut aggravating evidence of future dangerousness.[311]

Jury Considerations

Personal argument by counsel in support of a sentence less than death is important. Counsel who seeks to persuade a decisionmaker to empathize with the client must convey his or her own empathy.[312] While counsel may choose to discuss the gravity of the sentencer's life and death decision, the fact that the jury will have been death-qualified[313] means that trumpeting absolutist arguments against the death penalty is less likely to move the audience than sounding pro-life, pro-mercy notes that derive their resonance from the specific facts at hand.

It is essential that counsel object to evidentiary rulings, instructions, or verdict forms that improperly circumscribe the scope of the mitigating evidence that can be presented or the ability of the jury to consider and give effect to such evidence.[314] Counsel should also object to and be

310. *See supra* text accompanying note 290.

311. *See* United States v. Johnson, 223 F.3d 665, 671 (7th Cir. 2000) (describing how, to rebut government's assertion of future dangerousness, federal capital defendant put on evidence at penalty phase regarding conditions at "Supermax" prison where defendant would be housed if sentenced to life imprisonment), *cert. denied*, 534 U.S. 829 (2001); *supra* note 290.

312. *See supra* text accompanying note 185; White, *supra* note 3, at 374-75. An attorney whose contempt for his client is palpable cannot provide effective representation. *See, e.g.*, Rickman v. Bell, 131 F.3d 1150, 1157 (6th Cir. 1997) (describing counsel's "repeated expressions of contempt for his client" as providing the defendant "not with a defense counsel, but with a second prosecutor[;] creating a loathsome image . . . that would make a juror feel compelled to rid the world of him"); Clark v. State, 690 So. 2d 1280, 1283 (Fla. 1997) ("Counsel completely abdicated his responsibility to Clark when he told the jury that Clark's case presented his most difficult challenge ever in arguing against imposition of the death penalty.").

313. *See supra* commentary to Guideline 10.10.2.

314. *See, e.g.*, Penry v. Johnson, 532 U.S. 782, 799-800 (2001) (instructions and verdict form prevented jury from giving effect to mitigating evidence of defendant's mental retardation); McKoy v. North Carolina, 494 U.S. 433, 439-41 (1990) (verdict form and instructions suggesting mitigating circumstances must be found unanimously improperly restricted jurors' ability to give effect to mitigating evidence); Mills v. Maryland, 486 U.S. 367, 384 (1988) (same); Belmontes v. Woodford, 355 F.3d 1024, 1032 (9th Cir. 2003) (granting habeas relief on penalty because "the jury was not instructed that it must consider Belmontes' principal mitigation evidence, which tended to show that he would adapt well to prison and likely become a constructive member of society if incarcerated for life without possibility of parole"); Davis v. Mitchell, 318 F.3d 682, 691 (6th Cir. 2003); Banks v. Horn, 316 F.3d 228, 233 (3d Cir. 2003) ("'Under the United States Supreme Court's cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one the Court dares not risk.'") (quoting Mills, 486 U.S. at 384); Lenz v. Warden, 579 S.E.2d 194,

prepared to rebut arguments that improperly minimize the significance of mitigating evidence[315] or equate the standards for mitigation with those for a first-phase defense.[316] At the same time, counsel should request instructions that will ensure that the jury understands, considers, and gives effect to all relevant mitigating evidence.[317] It is vital that the instructions clearly convey the differing unanimity requirements applicable to aggravating and mitigating factors.[318]

If the jury instructions are insufficient to achieve the purposes described in the previous paragraph or are otherwise confusing or misleading, counsel must object, even if the instructions are the standard ones given in the jurisdiction. If the court does not instruct the jury on individual mitigating circumstances, counsel should spell them out in closing argument.

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196 (Va. 2003) (holding trial counsel ineffective for failure to object to defective penalty phase verdict form).

315. Prosecutors will frequently try to argue, for example, that "not everybody" who is abused as a child grows up to commit capital murder or that mental illness did not "cause" the defendant to commit the crime. *See* Haney, *supra* note 93, at 589-602. Both of these arguments are objectionable on Eighth Amendment grounds because they nullify the effect of virtually all mitigation. *See id.*; *supra* text accompanying notes 277-80. In any event, counsel can seek to counter such arguments by emphasizing the unique combination of factors at play in the client's life and demonstrating that there are causal connections between, for example, childhood abuse, neurological damage, and violent behavior. *See, e.g.*, Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1157-66 (1999) (reviewing psychological and medical "research on the correlation between childhood abuse and adult violence").

316. Arguments confusing the standards for a first phase defense and mitigation also violate the Eighth Amendment. *See generally* Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982) (finding unconstitutional trial judge's failure to consider defendant's violent upbringing as a mitigating factor at sentencing); *see generally* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21 (1997).

317. *See* Blume et al., *supra* note 287, at 398-99. *See also* Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 11-12 (1993) (describing results of study showing jury confusion as to meaning of instructions, particularly about the mitigating circumstance burden of proof); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1167 (1995) (describing results of study showing that a substantial percentage of jurors do not understand instructions concerning aggravating and mitigating evidence, burdens of proof and unanimity).

318. *See* McKoy v. North Carolina, 494 U.S. 433, 444 (1990) (instructions allowing jury to consider only mitigating circumstances found unanimously violated Eighth Amendment); Mills v. Maryland, 486 U.S. 367, 375-80 (1988) (same result where jury could misinterpret instructions to require unanimity); *supra* note 315.

Record Preservation

In some jurisdictions, counsel is required or allowed to either proffer to the court or present to the sentencer mitigating evidence, regardless of the client's wishes.[319] Even if such a presentation is not mandatory, counsel should endeavor to put all available mitigating evidence into the record because of its possible impact on subsequent decisionmakers in the case.

319. *See, e.g.*, Hardwick v.Crosby, 320 F.3d 1127, 1190 n.215 (11th Cir. 2003) ("Even if Hardwick did ask [counsel] not to present witnesses at the sentencing proceeding, . . . [counsel] had a duty to Hardwick at the sentencing phase to present available mitigating witnesses as Hardwick's defense against the death penalty."); Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993) (finding that:

> when a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be.);

State v. Koedatich, 548 A.2d 939, 993-95 (N.J. 1988) (mitigating factors must be introduced regardless of the defendant's position).

Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.

36 Hofstra L. Rev 677 (2008)

Guideline 5.1: Qualifications of the Mitigation Defense Team.

Guideline 10.11: Requisite Mitigation Function of the Defense Team.

Team must "conduct an ongoing, exhaustive and independent investigation of every aspect of client's character, history, and record. Team members must conduct "in-person, face-to-face, one-on-one interviews" with the client's family and other witnesses.

GUIDELINE 5.1—QUALIFICATIONS OF THE DEFENSE TEAM

A. **Capital defense team members should demonstrate a commitment to providing high quality services in the defense of capital cases; should satisfy the training requirements set forth in these Supplementary Guidelines; and should be skilled in the investigation, preparation and presentation of evidence within their areas of expertise.**

B. **The defense team must include individuals possessing the training and ability to obtain, understand and analyze all documentary and anecdotal information relevant to the client's life history. Life history includes, but is not limited to: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.**

C. **Mitigation specialists must be able to identify, locate and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information. They must be skilled interviewers who can recognize and elicit information about mental health signs and symptoms, both prodromal and acute, that may manifest over the client's lifetime. They must be able to establish rapport with witnesses, the client, the client's family and significant others that will be sufficient to overcome barriers those individuals may have against the disclosure of sensitive information and to assist the client with the emotional impact of such disclosures. They must have the ability to advise counsel on appropriate mental health and other expert assistance.**

D. **Team members must have the training and ability to use the information obtained in the mitigation investigation to**

illustrate and illuminate the factors that shaped and influenced the client's behavior and functioning. The mitigation specialist must be able to furnish information in a form useful to counsel and any experts through methods including, but not limited to: genealogies, chronologies, social histories, and studies of the cultural, socioeconomic, environmental, political, historical, racial and religious influences on the client in order to aid counsel in developing an affirmative case for sparing the defendant's life.

E. At least one member of the team must have specialized training in identifying, documenting and interpreting symptoms of mental and behavioral impairment, including cognitive deficits, mental illness, developmental disability, neurological deficits; long-term consequences of deprivation, neglect and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental and ethnic influences on behavior; effects of substance abuse and the presence, severity and consequences of exposure to trauma. Team members acquire knowledge, experience, and skills in these areas through education, professional training and properly supervised experience.

F. Mitigation specialists must possess the knowledge and skills to obtain all relevant records pertaining to the client and others. They must understand the various methods and mechanisms for requesting records and obtaining the necessary waivers and releases, and the commitment to pursue all means of obtaining records.

Cross- References:

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7—Investigation; 4.1—The Defense Team and Supporting Services; 5.1—Qualifications of Defense Counsel.

GUIDELINE 10.11—THE DEFENSE CASE: REQUISITE MITIGATION FUNCTIONS OF THE DEFENSE TEAM

A. **It is the duty of the defense team to aid counsel in coordinating and integrating the case for life with the guilt or innocence phase strategy.**

B. **The defense team must conduct an ongoing, exhaustive and independent investigation of every aspect of the client's character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death. The investigation into a client's life history must survey a broad set of sources and includes, but is not limited to: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.**

C. **Team members must conduct in-person, face-to-face, one-on-one interviews with the client, the client's family, and other witnesses who are familiar with the client's life, history, or family history or who would support a sentence less than death. Multiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation. Team members must endeavor to establish the rapport with the client and witnesses that will be necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding.**

D. **Team members must provide counsel with documentary evidence of the investigation through the use of such methods as genealogies, social history reports, chronologies and reports on relevant subjects including, but not limited to, cultural, socioeconomic, environmental, racial, and**

religious issues in the client's life. The manner in which information is provided to counsel is determined on a case by case basis, in consultation with counsel, considering jurisdictional practices, discovery rules and policies.

E. It is the duty of the defense team members to aid counsel in the selection and preparation of witnesses who will testify, including but not limited to:

1. Expert witnesses, or witnesses with specialized training or experience in a particular subject matter. Such experts include, but are not limited to:

a. Medical doctors, psychologists, toxicologists, pharmacologists, social workers and persons with specialized knowledge of medical conditions, mental illnesses and impairments; substance abuse, physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning.

b. Anthropologists, sociologists and persons with expertise in a particular race, culture, ethnicity, religion.

c. Persons with specialized knowledge of specific communities or expertise in the effect of environments and neighborhoods upon their inhabitants.

d. Persons with specialized knowledge of institutional life, either generally or within a specific institution.

2. Lay witnesses, or witnesses who are familiar with the defendant or his family, including but not limited to:

a. The client's family, extending at least three generations back, and those familiar with the client;

b. The client's friends, teachers, classmates, co-workers, employers, and those who served in the military with the client, as well as others who are familiar with the client's early and current development and functioning, medical history, environmental history, mental health history, educational history, employment and training history, military experience and religious, racial, and cultural experiences and influences upon the client or the client's family;

c. Social service and treatment providers to the client and the client's family members, including doctors, nurses, other medical staff, social workers, and housing or welfare officials;

d. Witnesses familiar with the client's prior juvenile and criminal justice and correctional experiences;

e. Former and current neighbors of the client and the client's family, community members, and others familiar with the neighborhoods in which the client lived, including the type of housing, the economic status of the community, the availability of employment and the prevalence of violence;

f. Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;

g. Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.

F. It is the duty of team members to gather documentation to support the testimony of expert and lay witnesses, including, but not limited to, school, medical, employment, military, and social service records, in order to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state, intellectual capacity, and life history that may explain or diminish the client's culpability for his conduct, demonstrate the absence of aggressive patterns in the client's behavior, show the client's capacity for empathy, depict the client's remorse, illustrate the client's desire to function in the world, give a favorable opinion as to the client's capacity for rehabilitation or adaptation to prison, explain possible treatment programs, rebut or explain evidence presented by the prosecutor, or otherwise support a sentence less than death.

G. It is the duty of the team members to aid counsel in preparing and gathering demonstrative evidence, such as photographs, videotapes and physical objects (e.g., trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts and letters of praise or reference.

Cross References:

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 4.1—The Defense Team and Supporting Services; 10.7—Investigation; 10.10.1—Trial Preparation Overall; 10.11—The Defense Case Concerning Penalty.

Appendix B

Defense Counsel Pretrial Motion

Relevant to Issues 1-4: Motion sets forth the very extensive mitigation case competent counsel were pursing before Mr. Cross was allowed to self-represent. Also includes mental health concerns.

Northeast Kansas Conflicts Office
700 SW Jackson, Ste 1001
Topeka, KS 66603
(785) 296-4402; Fax (785) 296-4413

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
DIVISION 17

STATE OF KANSAS, **Respondent**	)	
v.	)	**Case No. 14CR853** **Div. 17**
FRAZIER GLENN CROSS, Jr., **Defendant.**	)	

BRIEF IN SUPPORT OF
MOTION TO SET TRIAL DATE BEYOND THE 150 DAY TIMEFRAME
SET FORTH IN K.S.A. 22-3402(a)

COMES NOW, the defendant, Frazier Glenn Cross, Jr., by and through counsel, Jeffrey Dazey and Mark Manna, Northeast Kansas Conflict Office, and Martin Warhurst, and pursuant to the 6th Amendment to the United States Constitution, Section 10 of the Kansas Constitution Bill of Rights, *Woodson v. North Carolina*, 428 U.S. 280 (1976), *Strickland v. Washington*, 466 U.S. 668 (1984), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005), *State v. Cheatham*, 296 Kan. 417, 292 P.3d 318 (2013), and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913 (2003)[1], hereby requests that this Court delay the jury trial beyond the 150 day post arraignment period set forth in K.S.A. 22-3402(a), and instead set this case for trial no sooner than March of 2016.

In support of this motion, counsel alleges and states as follows:

[1] Accessible online at: http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf

Introduction

On April 13, 2014, Mr. Cross was charged by way of complaint with one count of Capital Murder. A little over one month later, on May 27, 2014, the State of Kansas filed an amended complaint adding three counts of Attempted First Degree Murder, one count of Aggravated Assault, and one count of discharging a firearm into an occupied dwelling. Shortly after the initial filing of charges, Ron Evans, of the Kansas Death Penalty Defense Unit, was appointed to represent Mr. Cross. On October 31, 2014, Martin Warhurst was also appointed to represent Mr. Cross. This matter was initially set for preliminary hearing on November 12, 2014, but that setting was continued after this Court sustained a defense Motion to Determine Competency. In December, 2014, this Court determined that Mr. Cross was competent to stand trial and set a preliminary hearing date of March 2, 2015. Further, on December 18, 2014, the State filed its Notice of Intent to Seek Separate Sentencing Proceeding Pursuant to K.S.A. 21-6617 (i.e., Notice of Intent to Seek the Death Penalty). On February 6, 2015, this Court sustained Mr. Evans motion to withdraw based on a complete breakdown in communications between counsel and the defendant. On February 13, 2015, Mark Manna was appointed to represent Mr. Cross.

This matter proceeded to a preliminary hearing on March 2 and 3, 2015. At the conclusion of evidence, this Court did find probable cause and bound Mr. Cross over to stand trial on all charges. This Court then continued the arraignment to 2:00 pm on Friday, March 27, 2015.

Defense counsel assert they will not be able to provide effective representation to

Mr. Cross, a defendant accused of a capital murder and facing a sentence of death, nor satisfy the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913 (2003), should this matter proceed trial within the 150 day post-arraignment period provided for in K.S.A. 22-3402(a). As of this date, Mr. Cross' defense counsel has identified dozens of potential witnesses in many states. Further, defense counsel have identified indispensible school, medical, and military service records of Mr. Cross existing in cities across America.

In short, defense counsel investigation has led to the conclusion that more investigation is essential to adequately defend Mr. Cross against the death penalty in this matter. Defense counsel has diligently sought to comport their efforts with the reasonable expectations of the ABA Guidelines, cited throughout this motion, and defense counsel's efforts have been rewarded with additional leads, which, pursuant to *Wiggins*, *Rompilla* and the ABA Guidelines, reasonable counsel must continue to explore to effectively represent Mr. Cross in this death penalty prosecution. Defense counsel cannot reasonably investigate and utilize the identified leads within the 150 day post-arraignment period provided for in K.S.A. 22-3402(a), and for the reasons and authorities set forth below, prays that this Court sustain defense counsel's request to delay the Jury Trial until March of 2016, at the earliest.

Statement of Law

"The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year sentence differs from one of only a year or two. Because of that qualitative difference,

there is a corresponding difference in the need to reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

It is beyond dispute that mitigating evidence is critical to the sentencer in a capital case. *See Skipper v. South Carolina,* 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). "As the Supreme Court has often noted, the Constitution requires individualized sentencing, and mitigating evidence is an important factor in ensuring this right." *Fitzgerald v. State,* 1998 OK CR 68, ¶ 41, 972 P.2d 1157, 1173, *citing Lockett,* 438 U.S. at 605, 98 S.Ct. at 2965. While the Eighth Amendment may not require mitigating evidence be presented in a capital trial, it does require that a defendant be given the opportunity to present such evidence. *See Pickens v. State,* 2001 OK CR 3, ¶ 47, 19 P.3d 866, 882.

In the benchmark-setting case of *Wiggins v. Smith*, 539 U.S. 510 (2003), the United States Supreme Court reversed a Maryland capital murder conviction after finding that trial counsel was ineffective. Although the trial counsel in *Wiggins* obtained some mitigation evidence, they failed to investigate Wiggins' social history or explore the numerous areas of mitigation outlined in the ABA Guidelines. The *Wiggins* court focused on "whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background itself *was reasonable*." 539 U.S. at 523 (emphasis in original). The United States Supreme Court found that trial counsel's decision to not investigate beyond the court-ordered Presentence Investigation and Maryland Department of Social Services report "fell short of professional standards." *Id.* at 524. The United States Supreme Court then utilized the ABA Guidelines for the

Appointment and Performance of Counsel in Death Penalty Cases (herein after, "ABA Guidelines") as the benchmark for gauging counsel's performance, "standards to which [the United States Supreme Court] long have referred as 'guides to determining what is reasonable.'" *Wiggins*, 539 U.S. at 524 (citing to *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

The *Wiggins* court found the ABA Guidelines instructive, noting that "investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Wiggins*, 539 U.S. at 524. Describing the ABA Guidelines as supplying "well-defined norms," the *Wiggins* court concluded that trial counsel's performance was deficient after "counsel abandoned their investigation of [Wiggins'] background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* Like the objectively deficient counsel in *Wiggins*, Mr. Cross' defense team fears that if forced to proceed to trial within the 150 day post-arraignment period provided for in K.S.A. 22-3402(a), they too will have only acquired a rudimentary knowledge of Mr. Cross' history from a narrow set of sources. *See id.* Further, and also like the counsel in *Wiggins*, Mr. Cross' defense team has uncovered ample evidence to suggest that a mitigation case for Mr. Cross could be quite productive and fruitful, as set forth below. *See also Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (finding trial counsel ineffective for failing to uncover and present evidence of defendant's 'nightmarish childhood,' borderline mental retardation, and good conduct in prison).

In 2005, the United States Supreme Court expanded the holding in *Wiggins* to

include circumstances in which the defendant suggests that no mitigating evidence is available. *Rompilla v. Beard*, 545 U.S. 374 (2005). The *Rompilla* court found that trial counsel was objectively deficient for failing to conduct an adequate mitigation investigation and that trial counsel was bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will rely on as evidence of aggravation at the trial's sentencing phase. 545 U.S. 374. The *Rompilla* decision reinforced the Court's reliance on the ABA Guidelines as benchmarks of death penalty defense counsel's performance. Had trial counsel followed the ABA Guidelines, trial counsel would have examined Rompilla's prior conviction file, and thereby uncovered a range of mitigation leads that no other source had opened up. 545 U.S. at 388, n. 7.

Other Circuit Courts have reached similar conclusions about the importance of the ABA Guidelines and thorough, comprehensive mitigation investigation. In *Douglas v. Woodford*, 316 F.3d 1079, 1087-89 (9th Cir. 2003), the Ninth Circuit found that although trial counsel did uncover and present some mitigating evidence, trial counsel's investigation "was constitutionally inadequate" for failing to dig deeply enough into client's social, medical, and psychological background. Further, the Ninth Circuit also found that trial counsel was deficient for failing to adequately prepare the penalty phase witnesses in order to present the material that he did have "to the jury in a sufficiently detailed and sympathetic manner." *Id.* at 1089. In *Brownlee v. Haley*, 306 F.3d 1043, 1070 (11th Cir. 2002), the Eleventh Circuit found that trial counsel in a capital case was ineffective for failing "to investigate, obtain, or present *any* mitigating evidence to the jury, let alone the powerful mitigating evidence of Brownlee's borderline mental retardation, psychiatric disorders, and history of drug and alcohol abuse."

In *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003), the Sixth Circuit noted its longstanding familiarity with and reliance upon the ABA Guidelines, and described in detail the role of the ABA Guidelines in guiding and structuring pretrial investigation:

> Prior to the *Wiggins* case, our Court in a series of cases had dealt with the failure of counsel to investigate fully and present mitigating evidence at the penalty phase of the case. Our analysis of counsel's obligations matches the standards of the 1989 Guidelines quoted by the Supreme Court in *Wiggins*. In *Glenn v. Tate*, 71 F.3d 1204, 1206-08 (6th Cir.1995), [a Sixth Circuit panel] set aside the death verdict on grounds of ineffective assistance of counsel at the penalty phase. The Court held that counsel must perform a full and complete investigation of mitigating evidence including the defendant's "history, background and organic brain damage." 71 F.3d at 1207. The Court also held that this investigation should be conducted before the guilt phase of the case. It said that the "time consuming task of assembling mitigating witnesses [should not wait] until after the jury's verdict...." *Id.* (quoting *Blanco v. Singletary*, 943 F.2d 1477, 1501-02 (11th Cir.1991)). The Court faulted the lawyers because they "made no systematic effort to acquaint themselves with their client's social history"-for example, they "never spoke to any of his numerous brothers and sisters," and "never examined school records" or "medical records" or "records of mental health counseling." *Id.* at 1208. In a similar case, *Austin v. Bell*, 126 F.3d 843, 847-48 (6th Cir.1997), [a Sixth Circuit panel] relied . . . *Glenn v. Tate* to explain that prevailing standards require a full and complete investigation of mitigating evidence. Then in *Coleman v. Mitchell*, 268 F.3d 417, 449-52 (6th Cir.2001), Judge Clay for himself and Judge Cole (Judge Batchelder dissenting), reviewed the holdings of *Glenn* and *Austin* and reached a similar conclusion. Like the Supreme Court in *Wiggins*, Judge Clay explicitly relied on the 1989 ABA Guidelines.

354 F.3d at 486-87.

ABA Guidelines

In *State v. Cheatham*, 296 Kan. 417, 292 P.3d 318 (2013), the Kansas Supreme Court recognized the importance of the ABA Guidelines in assessing the effectiveness of death penalty defense counsel. Although declining to explicitly weigh on the wisdom or propriety of following the ABA Guidelines, and declining to hold that they are coextensive with constitutional requirements, **the *Cheatham* Court did recognize that**

a failure to comply with the ABA Guidelines "may be relevant into an evaluation of whether counsel's performance fell below an objective standard of reasonableness." 292 P.3d at 329 (emphasis added). The Kansas Supreme Court then analyzed the performance of Cheatham's counsel in light of the ABA Guidelines, concluding that deficiencies must be tied to specific trial errors. *Id.*

As the ABA Guidelines, make clear, death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases. *See* ABA Guidelines, 31 Hofstra L. Rev. at 923 n. 3 (citing to *McFarland v. Scott*, 512 U.S. 849, 855 (1994) (noting the uniqueness and complexity of death penalty jurisprudence)). "The quality of counsel's 'guiding hand' in modern capital cases is crucial to ensuring a reliable determination of guilt and the imposition of an appropriate sentence. Today, it is universally accepted that the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master." ABA Guidelines, 31 Hofstra L. Rev. at 923.

The Introduction to the ABA Guidelines continues, noting that "[d]ue to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make 'extraordinary efforts on behalf of the accused,' . . . efforts [which] may need to include litigation or administrative advocacy outside the confines of the capital case itself (e.g., pursuit of information through a state open records law, administrative proceedings to obtain or correct a military record, a collateral attack to invalidate a predicate conviction, litigation of a systemic challenge to the jury selection procedures of a jurisdiction or district, or to a jurisdiction's clemency process)." ABA

Guidelines, 31 Hofstra L. Rev. at 923-24 n 5-9. All of which may be necessary in the coming months to adequately defend Mr. Cross.

ABA Guideline 10.7 concerns the need for defense counsel investigation in a death penalty case. "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." ABA Guideline 10.7(A). A thorough guilt phase investigation should occur "regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt." ABA Guideline 10.7(A)(1). Penalty phase investigations too should be conducted "regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented." ABA Guideline 10.7(A)(2); *see also Rompilla*, 545 U.S. 374. A thorough investigation of both phases of a capital murder defense is paramount before even basic decisions about trial strategy can be made. The monolithic significance of a thorough and comprehensive investigation is documented throughout the ABA Guidelines, and in State and Federal court opinions. See ABA Guidelines, 31 Hofstra L. Rev. at 1021, n. 205 to 208.

Specific Reasons for Request

Here, defense counsel for Mr. Cross sets forth the following list of specific errors, or deficiencies, which may occur if defense counsel's request to delay Mr. Cross' for a trial is denied. If this Court requests that the areas of concern outlined below be addressed in greater detail, defense counsel requests an opportunity to address the Court ex parte and in camera. *See* ABA Guidelines, 31 Hofstra L. Rev. at 1004 n. 176 ("Because the defense should not be required to disclose privileged communications or strategy to the prosecution in order to secure [additional expert services], it is counsel's

obligation to insist upon making such requests ex parte and in camera.").

Military Records

Defense counsel is aware of Mr. Cross' service in the armed forces during the conflict in Vietnam. However, defense counsel has struggled to obtain a complete and comprehensive picture of Mr. Cross' training and service abroad. The ABA Guidelines specifically recognize the importance, and frequent difficulty, of obtaining a comprehensive set for military records in capital cases. The ABA Guidelines in fact note this at the outset in introductory materials stating that defense counsel must make "extraordinary efforts on behalf of the accused," including administrative advocacy outside the confines of the capital case itself. ABA Guidelines, 31 Hofstra L. Rev. at 923. The ABA Guidelines lists "administrative proceedings to obtain or correct a military record," as a specific example of these efforts outside the confines of the capital case which defense counsel must make. *Id.* at 924. Furthermore, the ABA Guidelines note in commentary to Guideline 10.7, "Investigation," that "[b]ecause the sentencer in a capital case must consider in mitigation, 'anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant,'" to satisfy the guidelines, trial counsel needs to explore the defendant's: "[m]ilitary service, (including length and type of service, conduct, special training, combat exposure, health and mental health services)." ABA Guidelines, 31 Hofstra L. Rev. at 1022-23.

The ABA Guidelines advise that it is necessary to locate and interview "virtually everyone who knew the client and his family," including those who served with Mr. Cross in the armed forces, and that military records "can contain a wealth of mitigating evidence, documenting or providing clues to . . . brain damage, and/or mental illness."

ABA Guidelines, 31 Hofstra L. Rev. at 1024 n. 214. The ABA Guidelines stress that "counsel should use all appropriate avenues including signed releases, subpoenas, court orders, and requests or litigation pursuant to applicable open records statues, to obtain all potentially relevant information pertaining to the client, his siblings and parents, and other family members, including [specifically] . . . military records." ABA Guidelines, 31 Hofstra L. Rev. at 1025.

School, Hospital and Other Records:

The commentary to ABA Guideline 10.7(A)(2) describes the efforts required to effectively present mitigation in a death penalty case. "Because the sentencer in a capital case must consider in mitigation 'anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant,' 'penalty phase preparation requires extensive and generally **unparalleled investigation** into personal and family history.'" ABA Guidelines, 31 Hofstra L. Rev. at 1022 n. 209-10 (internal quotations removed) (emphasis added).

The "extraordinary efforts" required under the ABA Guidelines are certainly not limited to the acquisition of military records, but include school records, social service and welfare records, juvenile dependence or family court records, medical records, employment records, criminal and correctional records, family birth, marriage, and death records, and alcohol, drug abuse assessment or treatment records. *See* ABA Guidelines, 31 Hofstra L. Rev. at 1025. Under the ABA Guidelines, counsel should use all appropriate avenues to obtain these records, including signed releases, subpoenas, court orders, and requests for litigation pursuant to applicable open records statutes "to

obtain all potentially relevant information pertaining to the client, his or her siblings and parents, and other family members." *Id.*

Here, through defense counsel's initial investigations, counsel is aware of an abundance of potential mitigation leads from medical, hospital, and criminal history. It would not be reasonable for defense counsel to assume that the acquisition of this first round of records requests will not yield additional documentation and leads. Moreover, it would not be reasonable for defense counsel to assume that records keepers will promptly disclose sometimes sensitive and confidential records with the presentation of a simple records release. Additional efforts to obtain these records may be necessary.

In short, despite defense counsel's efforts to date, defense counsel avers that they are in the very early stages of a comprehensive records acquisition process which must span multiple states, providers and jurisdictions. The acquisition of these records is required under the ABA Guidelines 10.7, *Wiggins*, *Rompilla* and *Cheatham*, and defense counsel is at present far from satisfied with the comprehensiveness of the records accumulated. Finally, based upon the results and contents of the records, counsel may need to retain a specialized psychologist, psychiatrist, or neuropsychologist to conduct additional testing.

Family and Social History:

The commentary to ABA Guidelines 10.7(A)(2) emphasizes the need for an "unparalleled investigation into personal and family history." 31 Hofstra L. Rev. at 1022 n. 210. The ABA Guidelines compel counsel to explore, among other sources:

> Family and social history (including physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familiar instability, neighborhood

> environment, and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in a poor quality foster care of juvenile detention facilities);

ABA Guidelines, 31 Hofstra L. Rev. at 1022. The ABA Guidelines warn that the acquisition of this sensitive information may not be easy and that counsel should:

> bear in mind that much of the information that must be elicited for the sentencing phase investigation is very personal and may be extremely difficult for the client [or others] to discuss. Topics like childhood sexual abuse should therefore not be broached in an initial interview. Obtaining such information typically requires overcoming considerable barriers, such as shame, denial, and repression, as well as other mental or emotional impairments.

ABA Guidelines, 31 Hofstra L. Rev. at 1024.

The ABA Guidelines further direct that in fulfilling the requirements of Guideline 10.7(A)(2), "[i]t is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors . . . and others." 31 Hofstra L. Rev. at 1024. Records then become crucial to corroborate the recollections of personal interviews. *Id.* The ABA Guidelines also recommend acquiring similar records which may be available concerning the client's parents, grandparents, siblings, cousins, and children. 31 Hofstra L. Rev. at 1024 n. 215 (citing to *Williams*, 362 U.S. at 395 n. 19 (relying on a social worker's graphic description of the Williams home that could not have been provided by client, who was too young, or the adult family members, who were too intoxicated, to recall the scene)). Moreover, the ABA Guidelines direct that this multi-generational investigation

extend back as far as possible both "vertically and horizontally" to disclose "significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment." 31 Hofstra L. Rev. at 1023 n. 216. The ABA Guidelines warn that this effort is "a time-consuming task" but is "important wherever possible to ensure the reliability and thus persuasiveness of the evidence." *Id.* n. 217.

Here, through the investigations of defense team, counsel has identified many out-of-state penalty phase witnesses that need to be interviewed, in some cases multiple times and in person to ensure disclosure of highly sensitive information. Many of these witnesses are located in Missouri and Virginia, among other locations. Defense counsel is aware of significant time expenditures associated with identifying and interviewing each of these witnesses and is aware of the need for lengthy out of state travel to interview and document the impressions of these witnesses, as well as gather corroborating information covering significant periods of Mr. Cross' childhood, adolescence and young adulthood. To date, the defense team's investigation and interviews provide promising leads. Further investigation and interviews of these invaluable defense witnesses are necessary to fulfill defense counsel's duties under the ABA Guidelines, *Wiggins* and *Rompilla*.

Written Social History:

Recent case law, including *Wiggins*, has recognized the importance of developing a comprehensive psycho-social history of the defendant. *See Wiggins*, 539 U.S. at 517. The *Wiggins* court relied heavily on the elaborate social History prepared by Hans Selvog, which contained "evidence of the severe physical and sexual abuse

[Wiggins] suffered at the hands of his mother and while in the care of a series of foster parents. Relying on state social services, medical, and school records, as well as interviews with petitioner and numerous family members, Selvog chronicled [Wiggins'] bleak life history." *Id.* The integral importance of such a history was detailed in the transcript of Wiggins' April 1994 post conviction review proceedings in which "the judge observed from the bench that he could not remember a capital case in which counsel had not complied a social history of the defendant, explaining, 'not to do a social history, at least to see what you have got, to me is absolute error.'" *Id.* The lack of a comprehensive social history weighed heavily in the United States Supreme Court's conclusion that trial counsel's performance was deficient. *See id.*, at 524, 527.

The ABA Guidelines also recognize the importance of a social history in preparing for the penalty phase of a death penalty case, and assigns this task to the mitigation specialist, describing the final product as "a comprehensive and well-documented psycho-social history of the client based on **an exhaustive investigation**." ABA Guidelines, 31 Hofstra L. Rev. at 959 (emphasis added). The social history is critical for identifying mitigation themes, communicating with expert witnesses (especially experts in the mental health fields) and identifying crucial witnesses.

Guilt Phase Expert:

The ABA Guidelines forcefully recommend a team-based approach to death penalty defense, noting that "National standards on defense services have consistently recognized that quality representation cannot be rendered unless assigned counsel have access to . . . expert witnesses . . . to provide assistance . . . This need is particularly acute in death penalty cases." ABA Guidelines, 31 Hofstra L. Rev. at 955.

With the prosecution committing "vast resources to its effort to prove the defendant guilty of capital murder," the defense too "must both subject the prosecution's evidence to searching scrutiny and build an affirmative case of its own." *Id.* n. 91. Because defending a capital homicide is "uniquely complex and often involves evidence of many different types," the ABA Guidelines recognize that "[a]nalyzing and interpreting such evidence is impossible without consulting experts – whether pathologists, serologists, microanalysts, DNA analysts . . . or others." *Id.*

The ABA Guidelines recognize that efforts to obtain a defense expert are "time consuming and expensive." ABA Guidelines, 31 Hofstra L. Rev. at 956, n. 96. Here, in Kansas, Counsel must obtain competitive bids from multiple potential defense experts, scrutinize their resume and ensure that the expert is appropriately qualified to consult and testify about the narrow subject in question. Once retained and approved by the State Board of Indigents Defense Services, defense counsel must identify appropriate and relevant records (always conscious of time constraints on the expert), copy and disperse the records to the expert. The defense expert needs time to review available records, prepare a report, and submit the report along with the expert's CV, to counsel for the State with adequate time for the State to identify a rebuttal or consulting expert to scrutinize the defense expert's conclusions. Although the need for expert services often arises in the course of ordinary criminal cases, and defense counsel is familiar with this procedures, the need for expert witnesses is enhanced here, where "both the prosecution and the defense rely more extensively on experts in death penalty cases than in other criminal cases."*See* ABA Guidelines, 31 Hofstra L. Rev. at 955 n. 91.

Here, defense counsel has identified the need to identify and consult with a ballistics expert and venue study expert.

Mental Health Expert

Moreover, the need for defense experts is certainly not limited to the guilt phase of Mr. Cross' prosecution. As ABA Guideline 4.1(A)(2) makes clear, the defense team "should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." In the commentary to 4.1(A)(2), the ABA Guidelines recognize that:

> "[i]n particular, mental health experts are essential to defending capital cases. Neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses on death row. Evidence concerning the defendant's mental status is relevant to numerous issues that arise at various junctures during the proceedings, including competency to stand trial, sanity at the time of the offense, capacity to intend or premeditate death, ability to comprehend *Miranda* warnings, and competency to waive constitutional rights. The Constitution forbids the execution of persons with mental retardation, making this a necessary area of inquiry in every case. Further, the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase.

ABA Guidelines, 31 Hofstra L. Rev. at 956 n. 93-95. Because defense counsel is aware of significant potential physical, psychological, psychiatric and neurological conditions suffered by Mr. Cross, it would not be reasonable for defense counsel to simply ignore these conditions and neglect to retain and consult with a qualified mental health expert. *See, e.g., Caro v. Woodford*, 280 F.3d 1247, 1255 (9th Cir. 2002) (finding trial counsel ineffective for failing to investigate and present evidence of client's brain damage and failing to present expert testimony explaining "the effects of the severe physical, emotional, and psychological abuse to which Caro was subjected as a child); *Coleman*

v. Mitchell, 268 F.3d 417, 449-51 (6th Cir. 2001) (recognizing that trial counsel's duty to investigate mitigating evidence is well established, and finding trial counsel deficient for, in part, failing to investigate and present evidence that defendant suffered from probable brain damage and borderline personality disorder); *Jermyn v. Horn*, 266 F.3d 257, 307-08 (3d Cir. 2001) (finding trial counsel ineffective for failing to investigate and present evidence of defendant's abusive childhood and 'psychiatric testimony explaining how Jermyn's development was thwarted by the torture and psychological abuse he suffered as a child.').

Moreover, the commentary to Guideline 4.1(A)(2) recognizes that identifying and retaining a mental health expert and creating a competent and reliable mental health evaluation is a time-consuming and expenses process. ABA Guidelines, 31 Hofstra L. Rev. at 956 n. 96. The ABA Guidelines note that counsel "must compile extensive historical data, as well as obtain a thorough physical and neurological examination." 31 Hofstra L. Rev. 956. Further, "[d]iagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary." *Id.* n. 97. Finally, the efficacy of psychological, psychiatric or neurological experts is limited by the availability and comprehensiveness of supporting documentation and other evidence. *See id.* Because defense counsel is still in the process of assembling a comprehensive set of records (school, medical, military, mental and physical health, etc.) for Mr. Cross, defense counsel has not yet identified a specific mental health professional to consult, consistent with the obligations of Guideline 4.1(A)(2). Recognizing that the identification of a

qualified mental health expert is a "time consuming and expensive process," defense counsel must request that Mr. Cross' trial be delayed.

In short, Mr. Cross' defense counsel is not now prepared to proceed to trial in light of the affirmative obligation to fully consult with qualified experts in a wide-range of diverse areas. Counsel's efforts to retain and identify experts, especially in the penalty phase, has been hampered by the limited availability of supporting documentation, as discussed above. The defense team is in the early stages of identifying appropriate defense experts to consult with, but recognizes the need for more time to assemble necessary, comprehensive records and interviews, prior to identifying and retaining an expert. Counsel cannot effectively represent Mr. Cross at a trial setting within the 150 day post-arraignment period provided for by K.S.A. 22-3402(a) without completing the time consuming and expensive process of identifying a physical, psychological, psychiatric and possible neurological and/or neuropsychological expert, providing the expert with sufficient records to render a supported conclusion or diagnosis, time to interview and examine Mr. Cross himself, prepare a competent report, and to provide this report to counsel for the State with adequate time for the State to respond before trial. These tasks cannot reasonably be completed within the 150 day post-arraignment period provided for by K.S.A. 22-3402(a).

Defense Counsel Caseload:

ABA Guidelines 6.1 and 10.3 restrict the workloads of attorneys representing clients in death penalty cases to "a level that enables counsel to provide each client with high quality legal representation in accordance with these guidelines." While not imposing a strict number, the ABA Guidelines place the duty to maintain appropriate

workloads with the Responsible Agency (Guideline 6.1) and the attorneys accepting appointments (Guideline 10.3). The commentary on Guideline 10.3 notes that "[s]tudies have consistently found that defending capital cases requires vastly more time and effort by counsel than noncapital matters," with one cited study noting that defense attorneys in federal capital cases billing for over twelve times as many hours as noncapital cases. 31 Hofstra L. Rev. at 967-68 n. 115 (citing to Sub. Comm. On Federal Death Penalty Cases, Comm. on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (1998)).

Mr. Cross' defense team has received specialized training in death penalty defense. However, Mr. Cross' defense counsel continues handling felony cases in Shawnee County and elsewhere, including multiple on-going death penalty cases throughout Kansas. Most recently, lead counsel Mark Manna entered his appearance in this matter just over one month ago, on February 13, 2015. Because of the defense team's workload, Mr. Cross' defense counsel requests that Mr. Cross' trial be delayed beyond the 150 day post-arraignment period provided by K.S.A. 22-3402(a) to ensure that counsel is fully prepared for a jury trial.

Speedy Trial Waiver:

Defense counsel has visited with Mr. Cross concerning this request to continue the jury trial and advised Mr. Cross concerning his right to a speedy trial under K.S.A. 22 - 3402 and the United States Constitution. Mr. Cross is willing to waive his speedy trial rights and acquiesce to his defense counsel's request so long as he is given access to the internet from his jail cell.

Timing of Request:

Defense counsel is cognizant of the enormous effort required to bring a capital case to trial. By requesting this delay at the arraignment, defense counsel hopes to avoid a 'last minute' continuance request and save the court and counsel valuable time and resources.

Conclusion

Stated simply, death is different, and because of that qualitative difference, there is a corresponding need for heightened reliability in the determination that death is the appropriate penalty. *See Woodson*, 428 U.S. at 305. As defense counsel has diligently investigated this matter, defense counsel has encountered investigative leads in such great abundance that defense counsel now needs more time to adequately investigate these leads and incorporate them into a cogent and comprehensive trial defense of Mr. Cross consistent with obligations set forth in *Wiggins*, *Rompilla, Cheatham* and the ABA Guidelines. Mr. Cross' defense counsel has now identified many potential penalty-phase witnesses in many distant states. Further, defense counsel is aware of indispensible school, medical, mental health and military service records for Mr. Cross existing in cities throughout the United States.

In finding that the investigation of Wiggins trial counsel did not meet *Strickland's* performance standards, the *Wiggins* Court emphasized "that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter now unlikely the effort would be to assist the defendant at sentencing." 539 U.S. at 533. Rather, the *Wiggins* court based its conclusion that trial counsel was ineffective on the:

Much more limited principle that 'strategic choices made after less than

> complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.' A decision not to investigate thus 'must be assessed for reasonableness in all circumstances.'

Id. Here, reasonable professional judgments support anything but limiting investigation into Mr. Cross' defense. As set forth above, Mr. Cross' counsel recognizes the existence of multiple leads concerning Mr. Cross' upbringing, education, mental health, physical health and military service. Further, exploration of these leads requires more than simply obtaining documentation. Effective representation requires the incorporation of relevant documents into a comprehensive written social history, followed by circulation of the written social history to defense experts (including possible psychologists, psychiatrists, neuropsychologists, and neurologists), followed further by the preparation of reports by defense experts, and the circulation of reports among defense experts and providing reports and concludes with disseminating this documentation to counsel for the State of Kansas.

Mr. Cross' defense team hereby requests a reasonable accommodation of additional time to ensure that informed choices are made among available defenses, and that defense counsel has adequate time to develop these defenses. The authorities set forth above establish that abandoning reasonably fruitful and productive leads because of external time constraints constitutes a deprivation of Mr. Cross' constitutional guarantees to effective assistance of counsel and the right to present a defense.

WHEREFORE, the reasons and authorities set forth above, this Court should sustain Mr. Cross' request to delay the setting of a trial until at least March of 2016, to

ensure that defense counsel has adequate time to make informed choices among available defenses, assemble and prepare records, identify and retain experts, to disseminate records to defense experts, prepare reports, and provide reports and records to counsel for the State, consistent with their obligations to Mr. Cross under the 6th Amendment to the United States Constitution, Section 10 of the Kansas Constitution Bill of Rights, *Wiggins*, *Rompilla*, *Cheatham* and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

Respectfully submitted,

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NOTICE OF HEARING

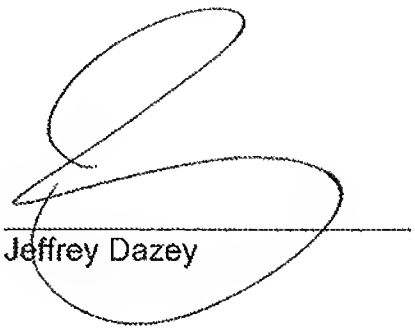
Mr. Cross hereby gives notice of his request to be heard on this Motion at the Arraignment set to occur on Friday, March 27, 2015, at 2:00 pm, before Judge T. Kelly Ryan in Division 17 of the Johnson County District Court.

Jeffrey Dazey, # 24552

CERTIFICATE OF SERVICE

I, Jeffrey Dazey, hereby certify that on March 25, 2015, a copy of this document was delivered by facsimile to:

Steve Howe and Chris McMullin
Johnson County District Attorney
100 N Kansas
Olathe, KS 66061
Fax (913) 715-3050



Jeffrey Dazey

Appendix C

Court's Colloquy with Mr. Cross on Waiver of Counsel.

Relevant to Issue No. 2: Failure to determine whether there was a knowing and voluntary waiver of counsel for the penalty phase. No advice on charges (aggravators) or penalties concerning the second phase. No indication of what counsel's core duties for that phase were.

No advice on charge or penalties for first phase.

counsel assigned to Mr. Miller's case have had a chance to state our positions, answer his questions. I believe he has made a decision in regards to whether he wants to represents himself pro se. He has indicated that he does.

I would add for the record that all counsel assigned to Mr. Miller have told him that we recommend that he not do this, that it is against advice. We do not think it's in his best interests.

THE COURT: Thank you, Mr. Manna.

Mr. Miller, it's your desire to represent yourself in this case?

THE DEFENDANT: Yes.

THE COURT: All right. And you've had Mr. Evans representing you previously, then he withdraw because of, as he stated, conflict of interest with you.

THE DEFENDANT: He told you, in my presence, that he found my views abhorrent.

THE COURT: So then we replaced Mr. Evans. Then Mr. Manna came in with Mr. Warhurst and Mr. Dazey was added and you've been working with them since; is that right?

THE DEFENDANT: Correct.

THE COURT: And you do not want their

assistance. You want to represent yourself in this case?

THE DEFENDANT: I want to go pro se because that's the only damn way you gonna let me talk.

THE COURT: Okay.

THE DEFENDANT: And I want to talk.

THE COURT: I need to ask you a series of questions to make sure that you understand the seriousness of this course of action.

You've spoken with all three of your attorneys today. And from what Mr. Manna has stated, that they've explained to you their opinion, their legal opinion, and opinion as the attorneys.

THE DEFENDANT: It's my life and I'll do with it as I please.

THE COURT: But they have told you that they're against -- they think the better way is for them to represent you; is that fair?

THE DEFENDANT: They get paid. They work for my enemy. The United States Government is my enemy.

THE COURT: All right.

THE DEFENDANT: And they work for them and the enemy pays them, just like you.

THE COURT: You have a statutory right and

a constitutional right to have an attorney appointed for you in a criminal case when there is a possibility of you serving prison time. You understand that?

THE DEFENDANT: Yeah.

THE COURT: All right. And it's even more so in a case such as this, that you're aware this is a capital murder charge. And as Mr. Howe has stated here, the first part of our hearing, that the State is not negotiating so far, from what I understand, that there's been some offers, but they intend to seek the death penalty. You understand that?

THE DEFENDANT: Yeah. The reason I offered to make a deal with him was I was under the impression at the time that if I did plead guilty we could waive the trial and save four months and go directly to the sentencing where I would have an opportunity to speak. That's the reason.

Now, the first time in June when I offered a deal it was because I was being murdered in the damn jailhouse because they were withholding my medication, namely, Brovana.

THE COURT: Okay. So --

THE DEFENDANT: And I was dying over there. I was getting five or six exasperations every damn

day. And they would not give me my proper medication. I wanted to see a pulmonary doctor. I couldn't breathe. That's why I offered a deal then.

But the death penalty doesn't bother me. What's the difference of me staring at the wall on death row or staring at the wall where I'm at now? The death penalty doesn't bother me.

THE COURT: You understand, sir, that at a trial you're going to be held to the same standard as an attorney, as if you had gone to law school and you have the experience that these three gentlemen have?

THE DEFENDANT: Is that the way you're going to treat me?

THE COURT: That's the way I'm required to treat you, as an attorney.

THE DEFENDANT: I'll do the best I can. I'll try to abide by the Court's procedures and be a gentleman as long as you let me speak.

THE COURT: All right. That's part of the issue, which is just the courtroom decorum of you can't just blurt out, like you tend to do every hearing.

THE DEFENDANT: Well, that's because I couldn't speak. You wouldn't let me speak. I had

to blurt out to say something.

THE COURT: Well, no, we're not going to operate that way. You understand --

THE DEFENDANT: I'll follow your instructions, Judge.

THE COURT: All right.

THE DEFENDANT: I'll follow the instructions.

THE COURT: You do understand, sir, some of these questions are -- seem obvious and seem so basic, but I need to ask you these.

THE DEFENDANT: No, reason, just policy. I understand.

THE COURT: That if you're convicted and then you go to the penalty phase that you face being put to death for this case.

THE DEFENDANT: Yes.

THE COURT: You understand that?

THE DEFENDANT: Yeah. I could probably make a deal right now and you could kill me in, say, six months from now.

THE COURT: I'm not --

THE DEFENDANT: I don't worry about that.

THE COURT: I'm not in the process of negotiating with you.

THE DEFENDANT: I'm a martyr. I'm dying for my people. And I'll go with a big smile on my face, I guarantee you. I'll show you how to die. I'll show you how a real man dies.

THE COURT: Along with the fact that I'm saying that you're held to the standard of an attorney is there is or there are -- there are entire books on procedure about courtroom procedure, criminal procedure, how cases are presented, evidence --

THE DEFENDANT: Do you got an extra copy?

THE COURT: I don't have an extra copy. I'm sure you can get one from the law library.

So my question for you, sir --

THE DEFENDANT: Law library, but I couldn't take it back to my cell and read it.

THE COURT: I don't know about that.

THE DEFENDANT: Well, I can tell you they don't allow that.

THE COURT: Okay. My point here, sir, is there's all sorts of rules that I have to govern the trial by. When we have --

THE DEFENDANT: I tell you, it would be a big help to me, Judge, to let me have a damn computer. The DA's got a whole bunch of computers.

And he's got a whole bunch of computer operators. I would just like to have one so I can get on half-assed legal terms, on equal terms.

THE COURT: We'll jump up to that, Mr. Miller.

THE DEFENDANT: Okay.

THE COURT: If I have -- or if I allow you to represent yourself, which I'll tell you I think is not a good idea.

THE DEFENDANT: Well, that convinced me to do it more, so if you want me to.

THE COURT: All right, that's fine.

THE DEFENDANT: Thank you.

THE COURT: My point for you here, since you bring it up, is I'm not changing that ruling about internet access if you're representing yourself. You're not going to have access to be on-line and everything that we've gone through a couple times.

THE DEFENDANT: Well, I won't get a fair trial by your own admission.

THE COURT: What's that?

THE DEFENDANT: Then I won't be getting even a remote fair trial because they got computers and they got, what, a dozen or more computer

operators to research and to prepare their case. What will I have? Nothing.

THE COURT: Well that's --

THE DEFENDANT: A freaking law library that you're restricted to, what, two or three hours a week.

THE COURT: I haven't put --

THE DEFENDANT: You have to walk a hundred yards and I can't even walk 10 most of the time.

THE COURT: I haven't put any restrictions on you accessing the law library. I've just said you're not going to have internet access.

THE DEFENDANT: Well, the library is no good to me down there.

THE COURT: That's part of the concern that you should have as far as representing yourself.

THE DEFENDANT: Well, that just shows to make the lemmings think that you treat us equal and you try to give us a fair shake. That's all this is. Window washing.

THE COURT: All right.

THE DEFENDANT: And you know it.

And by the way, you probably better read the global anti-Semitism Act that requires the federal government to combat criticism of Jews in every

country in the world.

THE COURT: Sir, this is a good example here. No, you wait a minute. You wait a minute.

I'm not here to just let you keep talking. We're here for a specific purpose. You're asking to represent yourself in this case. And when you want to go into your statements about things that are totally --

THE DEFENDANT: It's relative.

THE COURT: Its not relative, sir.

THE DEFENDANT: It is.

THE COURT: And you want to do that, you want to do that, you're going to be shut down. Because otherwise we could be here for three months trying this case. And that's not gonna happen.

My job is to direct this trial that's coming up in August. And if you're going to represent yourself, you have to abide by the rules.

THE DEFENDANT: I'm just pointing out, Judge --

THE COURT: Sir, no. Don't. I don't need you to explain anything. Because we're not going to go back into all the anti-Semitism and your interpretation of federal law.

THE DEFENDANT: It's a fact. Just read the

damn thing.

THE COURT: All right --

THE DEFENDANT: 2004 Global Anti-Semitism Act.

THE COURT: Sir. How much more do I need to explain to you we're not getting into that right now?

THE DEFENDANT: Are you making the decision right now that that act is not relevant?

THE COURT: I'm not making a decision about that because that is not --

THE DEFENDANT: You just did. You just said it.

THE COURT: Sir, the issue here is whether you're going to represent yourself and if these attorneys are going to stay involved in the case.

THE DEFENDANT: Well, you asked me a series of questions and I'm answering them the best way I can.

THE COURT: Well, you're not answering my questions I'm asking you. You're going far astray.

THE DEFENDANT: I'm not giving you the answer you want.

THE COURT: No, you're not answering the question.

These attorneys -- well, just in general, attorneys have gone to law school, they have the experience. They have passed the bar exam. They have specialized training.

These three gentleman here have particular expertise. And I'm sure they've told you about their background and how they've worked in capital murder cases before. Do you understand that?

THE DEFENDANT: I don't trust them.

THE COURT: Okay.

THE DEFENDANT: They working for the other side.

THE COURT: Do you understand that they have special --

THE DEFENDANT: Just like you are.

THE COURT: Sir, can I get out a statement here without you interrupting me?

THE DEFENDANT: Yeah, go ahead.

THE COURT: Your attorneys have specialized knowledge, not just as lawyers, but as capital defense attorneys. They have experience. And I think, from what I recall from the statements they've made before, 25, 30, 35 or more capital murder cases that they've been involved in, maybe a lot more, I don't know. But they have specialized

training that they are appointed in capital murder cases throughout the state because most attorneys don't have that experience.

You're going to be giving that up by representing yourself. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: Okay. Do you also understand, Mr. Miller, that, as hard as you may find this to believe right now, you may change your mind in the course of this and you may want to have counsel. And you just need to let me know that at any point in time if you want them to come back into the case. But they can't be yo-yoing back and forth, I want them in for this, I don't want them in for that, okay? Is that a fair arrangement?

THE DEFENDANT: I understand what you just said.

THE COURT: A fair arrangement that you'll let me know if you want counsel back in the case if you say that you're going to represent yourself?

THE DEFENDANT: I'll put that in my computer.

THE COURT: All right. You also understand -- and this probably isn't too much of an issue for you because you have asked for and I've

granted to you the jury trial in August within your 150 days. But, if you -- between now and then if you want to come in and say, hey, I'm representing myself, I need more time, that's not going to be the basis to postpone the trial. You understand that?

THE DEFENDANT: I don't want to postpone it. I tried to get to you rush it up every time I ever come in here.

THE COURT: Okay. And if you decide at any point in time between now and August or during the trial that you're going to bring in some other attorney, somebody else volunteers or you have somebody else help fund an attorney to represent you, that's not a reason to postpone the trial either. You understand that?

THE DEFENDANT: Yeah.

THE COURT: Okay.

THE DEFENDANT: I don't want to postpone it.

As a matter of fact, you know, lethal injection is a far more humane way to die then slowly with emphysema. It's a horrible death, Judge. So about six months from now, hell, I'll probably climb up on the gurney and stick the needle in myself if you will allow it, you and the DA over there.

THE COURT: Mr. Miller, as I stated before, because of procedure, because of courtroom decorum, for lack of an overall term, to be able to conduct a trial, that if you get -- if you start making statements out of turn and you launch off on things, if you cause a ruckus, basically, in the courtroom --

THE DEFENDANT: What you gonna do?

THE COURT: I'm going to have you removed from the courtroom and I'm going to reappoint attorneys to represents you at that point. That's what I'm going to do.

THE DEFENDANT: You going to assign attorneys to represent me against my wishes?

THE COURT: If you interfere with conducting the trial, absolutely.

THE DEFENDANT: Well, you could -- that means that you could use my incompetency as a an excuse to force me to accept one of these government paid --

THE COURT: I didn't say anything about incompetence, sir.

THE DEFENDANT: Well, it's a judgment call.

THE COURT: We've already had a competency hearing and that was when the report came back and

said that you were competent to understand --

THE DEFENDANT: So you don't need to --

THE COURT: Sir, once again, can you let me finish making a statement before you just jump all over it? It's really heard for the court reporter to take all that down, first off. And I would also like to be able to make the statements and have you answer, because that's what we're here for, okay? Is that fair? Can you do that?

THE DEFENDANT: Bring that by me again.

THE COURT: Can you let me finish my statements or my questions and then I'll give you a chance to talk?

THE DEFENDANT: Okay.

THE COURT: Fair and simple?

THE DEFENDANT: Okay, fair enough.

THE COURT: If you conduct yourself in hearings, in court, in front of the jury, in any way to obstruct the proceedings or you're causing a problem based on your intentional acts, that is the -- that is what will happen is that I'm going to bring attorneys, probably these attorneys, back in to represent you because you're -- if it gets to that point, you don't have a right to self-representation in any way you want.

That's why I say the procedure is going to apply to you as well. What do you have to say to that?

THE DEFENDANT: If you force an attorney on me against my wishes I won't be in this courtroom. I'll just sit in my cell. That would be my preference.

THE COURT: Okay. Just as long as you understand that, that if I allow you to represent yourself --

THE DEFENDANT: I know that's what you're gonna do.

THE COURT: Again, I will say that I think it is to your detriment not to accept the services being offered by these attorneys to represent you for a whole host of reasons, such as you may make statements that lead to your conviction that you wouldn't otherwise have to do, the right against self-incrimination. You understand that?

THE DEFENDANT: Yeah.

THE COURT: You also may not be able to present the same type of defense that these attorneys can provide for you under what they have been doing up to this point.

THE DEFENDANT: Compelling necessity, your Honor, I've told you that all the time. Compelling

necessity, that is my defense.

THE COURT: You're going to be responsible, Mr. Miller, to arrange for, if you want to have witnesses, if you want to have experts, that's going to be your responsibility. Do you think you're up for that?

THE DEFENDANT: Yeah. All they got to do is jump in a vehicle and drive up here.

THE COURT: All right.

THE DEFENDANT: Mel Gibson is one of them, by the way.

THE COURT: There are disadvantages, there's dangers, literally, in representing yourself, sir. And that includes, as you've seen, your attorneys have filed 21 motions on this first round, 21 pretrial motions. And there's probably a lot more than that that can be heard that I'm aware of. And there may be things that they have in consideration and may be filing yet.

But that by not having your attorneys, some of these motions that are technical in nature, because of the law that you may not be aware of, you would be losing out on that opportunity. You understand that?

THE DEFENDANT: Yeah.

THE COURT: Now, that ties into a question

for me, Mr. Miller, is that you do have experience in the criminal system; is that right?

THE DEFENDANT: Yeah.

THE COURT: Have you ever represented yourself before?

THE DEFENDANT: No.

THE COURT: Okay. You've had -- any time that you've been charged in a criminal case, have you had an attorney represent you?

THE DEFENDANT: Well, it hasn't been that many times.

THE COURT: Okay. But how many times -- how many cases?

THE DEFENDANT: Two.

THE COURT: Two? And have you gone to trial on either one of those?

THE DEFENDANT: Yeah.

THE COURT: Both of those?

THE DEFENDANT: Uh-huh -- no, just one.

THE COURT: One of the two. And you had an attorney in both of those cases, right?

THE DEFENDANT: Yeah.

THE COURT: All right. So you've been through at least one -- was it a jury trial?

THE DEFENDANT: Yeah.

THE COURT: Okay. So the process or procedure may be a little bit different because that -- that wasn't here in Kansas, was it?

THE DEFENDANT: No, no.

THE COURT: Was that in Missouri?

THE DEFENDANT: North Carolina.

THE COURT: Okay. Now, their rules and procedures may be different, but it's the same principles as far as selecting a jury, opening statements, presenting evidence, cross-examining witnesses, closing arguments.

THE DEFENDANT: Piece of cake.

THE COURT: Okay. Just so you understand that's -- that same premise is how we operate here. There may be some differences in some of the rules.

I can't help you in doing that. And if you want to introduce evidence, for instance, and you don't present it the right way, I can't say, well, Mr. Miller since you don't have an attorney I'll let you go ahead and do that. You understand that?

THE DEFENDANT: Yeah, you're preparing -- you're preparing the grounds for forcing an attorney on me. That's what you're doing.

THE COURT: No, I'm talking --

THE DEFENDANT: Yeah, you are.

THE COURT: -- about such as admitting evidence --

THE DEFENDANT: I know what you're doing.

THE COURT: -- or bringing in witnesses.

THE DEFENDANT: I know who you work for.

THE COURT: You understand that?

THE DEFENDANT: I know who you work for.

THE COURT: Do you understand that, sir?

THE DEFENDANT: Yeah.

THE COURT: Okay. There also can be objections you can make to what the State's trying to present. You understand that? In the trial you had before, did your attorney make objections during the trial?

THE DEFENDANT: Sure.

THE COURT: And were some things not admitted because he or she objected to it?

THE DEFENDANT: I don't remember.

THE COURT: Okay. But you understand, you may be able to object to something the State's introducing and I'm not -- I'm not going to jump in the middle of it and say, hey, you really shouldn't be doing that.

THE DEFENDANT: Well, I can type 90 words a minute, I can't write good, because I've been typing

all these years. And in jail they give you one of those little Bic pens that's taken out of the holder and it's real limber. It's about that long. And it's like a tooth pick and it's very difficult to write.

THE COURT: Okay.

THE DEFENDANT: So I need a typewriter. Will you let me have a typewriter?

THE COURT: We can probably arrange for a typewriter for you.

THE DEFENDANT: In my cell?

THE COURT: For you?

THE DEFENDANT: In my cell.

THE COURT: I can't tell you that. I'm not ordering the Sheriff to do that but we'll consider that.

THE DEFENDANT: That would be a big help for me. I know how to type motions. I've done that before.

THE COURT: That's another area. As far as these motions, if you're representing yourself, you don't have Mr. Manna or Mr. Warhurst or Mr. Dazey to file those for you. You understand that?

THE DEFENDANT: I type objections. I can do that. I type 90 words a minute.

THE COURT: You also understand, again, maybe an obvious question for you, but during pretrial motions, during hearings, during the trial, District Attorney's Office isn't going to help you out in any way, you understand that?

THE DEFENDANT: Oh, well, he just wants to get his name in the newspaper, you know that.

THE COURT: But you understand that they're not going -- just because you're representing yourself, if I let you do that --

THE DEFENDANT: They're not gonna give me no slack.

THE COURT: -- they're not gonna help you any. You understand that?

THE DEFENDANT: I'm not gonna give him no slack. So I'm going to inform him of that. I'm going to make him wish he never heard my name.

THE COURT: You may also be waiving constitutional, statutory, common law rights that you're not aware of waiving in the course of representing yourself. Do you understand that?

THE DEFENDANT: I didn't understand that, but I hear you. I hear you. You're not gonna talk me out of representing myself.

You've made it perfectly clear that's the only

way I'm going to be able to talk, the only way for me to talk and to explain myself and to -- and to present my defense.

THE COURT: Okay. Well, that's a good point.

THE DEFENDANT: Compelling necessity.

THE COURT: Let me go to that point that you've raised a couple times, Mr. Miller. I don't know what the details are of that and that might be a motion that you file. But I'm also going to tell you, there's no guarantee, just because you want to represent yourself and that you are representing yourself at trial, what you think is a valid defense may not be.

THE DEFENDANT: It might violate the Anti-Semitism Act.

THE COURT: It might?

THE DEFENDANT: In which case you'd be breaking the law if you allow me to criticize Jews in this courtroom.

THE COURT: Right. And we'll bring that up if you file a motion and bring that up.

THE DEFENDANT: Are you saying that's right?

THE COURT: I didn't say it was right.

THE DEFENDANT: Yes, you did. You said it's right.

THE COURT: I didn't say it's right.

THE DEFENDANT: Play it back.

THE COURT: Okay. Also the fact that you are in custody is, by it's very nature, going to make it difficult for you to locate witnesses, to interview witnesses, prepare subpoenas, have those subpoenas served, talk to experts, retain experts.

THE DEFENDANT: All I need is freedom of speech, your Honor, freedom to write letters and freedom to telephone my witnesses.

THE COURT: And, again, I'll go back to the bottom line in all of this, Mr. Miller, the maximum sentence that can be imposed and what the State's asking for is the death penalty.

THE DEFENDANT: I realize that. But like I say, I don't worry about that. I'm dying anyway. Six months. We can probably work out a deal. He can put me up on the tabling in six months and I'll stick the needle in me.

THE COURT: Do you feel you're competent to represent yourself?

THE DEFENDANT: Absolutely. My IQ is probably higher than yours.

THE COURT: Might be.

THE DEFENDANT: And I'm damn sure more intelligent. And I have a more accurate world view. That's -- you probably got Jewish friends, and which -- in which case you probably shouldn't even be sitting there. Is that an accurate statement?

THE COURT: Sir, I'm not going to respond to your various miscellaneous statements, all right? I'm here for a job, which is to conduct a trial, eventually. Right now I'm trying to decide whether or not you should represent yourself, if there's enough basis for you to do that.

Mr. Manna and Mr. Warhurst and Mr. Dazey, I'll ask you as a group, have any of you acted as standby counsel in a capital case previously? And the second part to that is, if that's a possibility, are you willing to do that in this case?

MR. MANNA: Judge, I don't believe any of us have ever operated as standby counsel in a capital case. In fact, I'm not aware of any capital case in Kansas in which a defendant represented himself standby. We are willing individually and as a group, though, to act as standby counsel.

THE COURT: All right. Have you discussed that issue with Mr. Miller as far as what standby

counsel would or would not do at this stage going forward?

MR. MANNA: We've discussed with him that the Court could order us to remain as standby counsel. The question then becomes the parameters of what standby counsel does.

I would inform the Court that we've already argued to the Court that because there was not a waiver of speedy trial we are in a position where we're not able to even prepare a defense for Mr. Miller that we feel lives up to the requirements under the law. As standby counsel, our concern is, is that if the defendant has the control of the trial strategy and directs us to engage in work that takes up the limited resources and time that we have, and it turns out not to be viable to his defense, if we're brought in as counsel, that puts us even in a worse position.

So I only raise that when the Court considers what are the parameters, what are our roles as standby counsel? We'll do whatever the Court instructs us to do as standby counsel, whether that's simply appearing for the proceedings and being ready to take over if Mr. Miller requests that or the Court orders it, or if that involves us assisting Mr. Miller in some fashion

at his direction, if, again, the Court orders that.

But we would ask for some direction in that regard.

THE COURT: Mr. Miller, you've talked with your attorneys about the potential, at least, for them to be what's called standby counsel if you represent yourself?

THE DEFENDANT: Yeah. I would like them to help me. I need all the help I can get, obviously. But they could do a lot of good for me. They could do a lot of research and bolster my defense.

THE COURT: That's the difficult part, besides the very obvious difficult part is, as they've said -- or as Mr. Manna has said on behalf of all of them. They've never been involved in a case, in a death penalty case, where the defendant is representing themselves. You understand that? So we're kind of going out on new ground here.

THE DEFENDANT: Yeah, I understand that. It will be up to you what the extent to which they'll be able to help me. It's up to you.

THE COURT: Mr. Miller, you've stated in court -- you haven't filed any motions yourself, right? You haven't written out any motions other than your affidavit that was attached to that one

motion about internet access?

THE DEFENDANT: No. I've submitted a lot of motions in court, civil.

THE COURT: No, in this case. In this case.

THE DEFENDANT: Not in this case, no.

THE COURT: You have filed motions in other cases before?

THE DEFENDANT: Yes, yes.

THE COURT: In court you've said on various occasions, not every time, but a lot of times you've been in here, that you want to fire your attorneys so you have an opportunity to talk. Is that a good summary of your appearances in court?

THE DEFENDANT: I didn't understand what you just said.

THE COURT: That you've said you want to fire your attorneys so you're able to talk.

THE DEFENDANT: Yeah.

THE COURT: Okay. In your affidavit attached to the motion about internet access, you -- I'm paraphrasing here -- but you're saying if the only way to get internet access, if the only way that I would grant that motion is to fire your attorneys then you want to fire them. Do you

remember that?

THE DEFENDANT: Yeah, I think I said that.

THE COURT: Okay.

THE DEFENDANT: I think I said that.

THE COURT: And I'm not talking directly about that point. But overall you, this is the overarching question, you want to fire your attorneys and go forward on your own?

THE DEFENDANT: Yes. But the computer is huge for me. You can imagine, because all my friends, I got thousands of supporters out there who I can converse with if I have a computer. And I can get their assistance and their expertise.

A lot of them are attorneys, by the way.

THE COURT: Okay. Well, we've gone over that.

THE DEFENDANT: So I was willing to do just about anything just to have that to be a benefit that would make me somewhat comparable to the DAs. I mean, comparable, what I got to what they got, that's not fair.

THE COURT: Do you have any other questions about the issue of representing yourself, other than what we've gone over here this morning?

THE DEFENDANT: I don't have any questions,

no. It's up to you. The boss is not always right but the boss is always the boss.

THE COURT: All right.

Counsel, I am going to find that Mr. Miller has made repeated statements and representations, including written statements in prior court pleadings, that he wants to represent himself. In this colloquy we've just had here this morning, I will find that Mr. Miller certainly is cognizant, aware of the gravity of these proceedings, aware of the environment that we're in, that we're in the process of preparing for a jury trial on a capital murder case for which he stands the possibility of being sentenced to death.

Despite reservations, despite suggestions, to whatever extent the attorneys have informed Mr. Miller of the fact they do not think it is to his advantage to represent himself for his reasons, as well as I've pointed out here today, I will find that Mr. Miller has made a knowing and intelligent waiver of his right to counsel and also a knowing and intelligent decision to represent himself, despite these hurdles.

Mr. Miller's wishes or desire to represent himself made in this understandable and in a knowing and intelligent way, and with his background, with his prior experience in the court system, with his

experience in this case up to date for over a year, I will find that his waiver of counsel is appropriate and sufficient to allow him to proceed in representing himself in this case.

THE DEFENDANT: Thank you.

THE COURT: Because of the unique nature of that ruling in this type of case, I will have Mr. Manna and Mr. Warhurst and Mr. Dazey acting as standby counsel. As I've said before, if Mr. Miller exhibits or intentionally causes problems which would interfere with the presentation of this case to move it forward or for a fair trial for everyone involved, that the standby counsel, the attorneys, are there to step in.

I don't know if that's going to occur or what happens. That's in the future. But it's there as the backup. That's standby or backup counsel.

Ordinarily, in cases with a defendant who is going to represent themselves at trial, standby counsel are just that, they can literally be sitting behind the defendant letting them handle the case. They're not there to give advice, give their legal advice or their practical advice or assist with filing motions or strategy, all of those different things. Ordinarily, they're there only for the purpose of

Appendix D

Offers to Plead Guilty

Relevant to Issue 8: Exclusion of relevant mitigating evidence.

Death Penalty Defense Unit
700 SW Jackson, Ste 500
Topeka, KS 66603

Kansas

phone: 785-296-6555
fax: 785-291-3979
www.sbids.org

Death Penalty Defense Unit - Topeka

Sam Brownback, Governor

June 5, 2014

Stephen M. Howe
Johnson County District Attorney
P.O. Box 728
Olathe, Kansas 66051
(913) 715-3000

Re: State of Kansas v. Frazier Glenn Cross, Jr.

Dear Mr. Howe:

I am sending you this letter to convey Mr. Cross' desire to resolve this case in an expedited manner. He is interested in negotiating a "global settlement" to resolve the pending State charges and impending Federal hate crime charges against him. I have been authorized to convey the following proposal:

Mr. Cross would be willing to plead guilty to all charges that he is currently facing from the State of Kansas in case number 14CR853. Also, he would be willing to plead guilty to the anticipated Federal hate crime charges from the United States Attorney's Office for the District of Kansas. In return, Mr. Cross would request his sentences in these counts amount to no more than Life without the possibility of parole. In other words, the death penalty would need to be taken off the table. Additionally, Mr. Cross would request that he be allowed to serve his time in a Federal Bureau of Prisons Medical Facility; specifically, FMC Rochester.

It is my belief that the most effective way to fashion the details and logistics of such an agreement would be to have all interested parties meet to discuss this further. I would be happy to facilitate such a meeting at your earliest convenience. In the meantime, please accept this letter as an initial proposal on Mr. Cross' behalf that establishes the terms that would be necessary to resolve this case quickly.

Sincerely,

Ron Evans

Frazier Glenn Cross Jr

Frazier Glenn Miller Jr

5 JUL 2014

DEFENDANT'S EXHIBIT

PENGAD 800-631-6989

Northeast Kansas Conflict Office
700 SW Jackson St, Ste 1000
Topeka, KS 66603

Kansas

Phone: 785-296-4402
Fax: 785-296-4413
www.sbids.org

Northeast Kansas Conflict Office

Sam Brownback, Governor

April 10, 2015

Stephen M. Howe
Johnson County District Attorney's Office
P.O. Box 728
Olathe, KS 66051

Re: State of Kansas v. Frazier Glenn Miller/Cross Jr. 14CR853

Dear Steve:

I've reviewed the previous defense plea offer dated June 5, 2014 and the States decline of that offer dated October 21, 2014. I've spoken with my client on several occasions the last month and he continues to express an interest in a non trial resolution of this case. He has expressly indicated that he is willing to enter pleas of guilty to all counts/charges contained in the States second amended complaint. He would accept the maximum punishment for each offense allowable by law. This includes aggravated numbers on the on grid offenses and consecutive counts. In return he would only ask that the State withdrawal it's notice to seek death and allow him to be sentence to life in prison without the possibility of parole. No additional agreements or recommendations of placement or conditions of housing would be requested. I believe this to be a sincere offer from Mr. Miller. If this is something that would be acceptable to you and the victims' families please let me know. If not, I fully understand and appreciate that position.

Sincerely,
Mark A. Manna

Mark A. Manna

STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY

STEPHEN M. HOWE, DISTRICT ATTORNEY

October 21, 2014

Ron Evans
700 S.W. Jackson Suite 500
Topeka, Kansas 66603

Re: *State v. Frazier Glenn Cross*, 14CR853

Dear Ron,

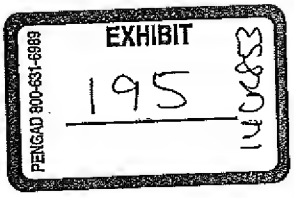
We are in receipt of your correspondence dated June 5, 2014, wherein your client offered to plead guilty to all charges and serve a life sentence without the possibility of parole.

We decline this offer. After considering all of the facts in this case, including the documents provided to us concerning Mr. Cross's health, we are advising you that this office will be seeking the death penalty. Formal notice will be provided as required by law.

If you have any questions or concerning regarding any of these matters, please feel free to contact me any time at 913-715-3015.

Respectfully,

Stephen M. Howe
District Attorney
Johnson County District Attorney's Office
P.O. Box 728
Olathe, KS 66051



STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY

STEPHEN M. HOWE, DISTRICT ATTORNEY

May 6, 2015

Mark Manna
Northeast Kansas Conflict Office
700 SW Jackson St. Suite 1000
Topeka, KS 66603

Re: *State of Kansas v. Frazier Glenn Cross/Miller, Jr.* 14CR853

Dear Mark:

I am in receipt of your correspondence dated April 10, 2015, wherein your client offered to plead guilty to all charges in this case and to serve a life sentence without the possibility of parole.

After considering all of the facts in this case, I declined this offer.

If you have any questions or concerns, please feel free to contact me anytime at 913-715-3015.

Sincerely,

Stephen M. Howe
Johnson County District Attorney
PO Box 728
Olathe, KS 66051